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'Bound Fast and Brought under the Yoke': John Adams and the Regulation of Privacy at the Founding

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effect, and as such, vested in individuals the right to challenge national measures which allegedly infringe upon these rights.[86] In *van Binsbergen*, the Court was asked to provide a preliminary ruling as to whether Articles 49 and 50 had direct effect.[87] Van Binsbergen challenged a Dutch law which prevented him from using the services of a legal representative whose primary place of residence was not in the Netherlands.[88] The Court held Articles 49 and 50 had direct effect, and that national law may not impede trans-border services simply because the service provider resides in another member state, and not locally.[89] In its analysis, the Court looked to the parallel conclusion in *Reyners*[90] that the right of establishment has direct effect.[91]

Through judgments in several cases,[92] the Court has clearly established that even non-discriminatory restrictive measures will only be permitted under limited circumstances. In *van Binsbergen*,[93] the Court considered the effect of the restriction on the right to provide services, and noted that all requirements that a person providing service must be a national of the Member State in question, or which mandated habitual residence in the Member State would "depriv[e] Article 59 [now Article 49] of all useful effect."[94] The Court recognized that such requirements may be compatible with Treaty law when necessary for the "general good."[95]

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86. Vertical direct effect permits a citizen of a Member State to challenge the Member State's national regulations, laws or measures that infringe upon a freedom granted by the Treaty or a directive with direct effect. Thus there is a private right of action, not simply an obligation as between the members of the Community. *See* Hartley, *supra* note 41, at 206-15 (explaining direct and indirect effect); Bermann et al. *supra* note 36, at 252. Horizontal direct effect, on the other hand, creates rights of action between private parties. *Id.* Thus, where there is horizontal effect, a person has Treaty rights and obligations vis-à-vis other people, not just against the Member State.

87. *See* Case 33/74, van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299, ¶ 18, [1975] 1 C.M.L.R. 298 (1974), ¶ 18 ("The Court is also asked whether the first paragraph of Article [49, previously Article 59] and the third paragraph of Article [50, previously Article 60] of the EEC Treaty are directly applicable and create individual rights which national courts must protect.").

88. *See id.* ¶ 4 (noting also that the legal representative was a Dutch national who moved to Belgium during the proceedings).

89. *See id.* ¶¶ 15-16 (deciding that in the absence of a requirement of special qualifications or "professional regulation" a requirement that the provider of services be a habitual resident of the locale is not acceptable).

90. Case 2/74, *Reyners*, 1974 E.C.R. 631, [1974] 2 C.M.L.R. 305.

91. *See id.* ¶ 32; *see also* Case 33/74, *van Binsbergen*, 1974 E.C.R. 1299, ¶ 27, [1975] 1 C.M.L.R. 298, ¶ 27.

92. Case 33/74, *van Binsbergen*, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298; Case 205/84, Commission v. Germany (*In re* Insurance Services), 1986 E.C.R. 3755, [1987] 2 C.M.L.R. 69 (1986); Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995).

93. Case 33/74, *van Binsbergen*, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298.

94. *Id.* ¶ 11.

95. *Id.* ¶ 12.

The general good or public interest exception was carried forward over a decade later in another significant Court decision in *In re Insurance Services*.[96] The Court held that restrictions upon the freedom to provide services could only be accepted if "in the field of activity concerned there are imperative reasons relating to the public interest."[97] More recently, the public interest exception was critical to the Court's reasoning in *Gebhard*,[98] when the Court stated that any acceptable restriction "must be applied in a non-discriminatory manner [and] must be justified by imperative requirements in the general interest."[99] These three cases illustrate the development of the rule that non-discriminatory measures, like discriminatory ones, will only rarely be tolerated.

4. Free Movement of Capital

Finally, with the amendments to the Treaty in Maastricht, effective on November 1, 1994,[100] free movement of capital is now also specifically and indisputably protected by Article 56.[101] The original EEC Treaty included a chapter devoted to capital movements, within which Article 67 obligated Member States to "progressively abolish between themselves all restrictions on the movement of capital."[102] The Chapter allowed the Council to adopt directives to further this goal,[103] and in the 1960s two such directives were adopted.[104]

However, Article 67 was limited by Article 73, which allowed the Commission to authorize, and Member States to implement,

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96. Case 205/84, *In re Insurance Services*, 1986 E.C.R. 3755, [1987] 2 C.M.L.R. 69. In *In re Insurance Services*, the Court evaluated certain German restrictions placed upon insurers established in another Member State. In order to provide insurance services within a second state, German law required that the insurer have a permanent establishment in the second state, as well as separate authorization from the appropriate supervisory body of the second state. *Id.* ¶ 28.

97. *Id.* ¶ 29.

98. Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995). *Gebhard* is important to the analysis of the golden share cases not only for its adoption of the public interest exception, but also for the formulation of the four-part test which the Court applies to restrictive national measures. *Gebhard* is discussed in greater detail *infra* notes 135-39 and accompanying text.

99. Case C-55/94, *Gebhard*, 1995 E.C.R. I-4165, ¶ 37, [1996] 1 C.M.L.R. 603, ¶ 37.

100. Treaty on the European Union, Feb. 7, 1992, 2002 O.J. (C 325) 1, 32 (as amended by the Treaty of Nice).

101. EC Treaty art. 56. For the text of Article 56, see *supra* note 64.

102. Bermann et al., *supra* note 36, at 1173 (quoting Article 67(1) (now deleted) of the EEC Treaty).

103. EC Treaty article 69 (repealed by the Treaty of Amsterdam) granted the Council authorization to issue directives to implement Article 67. *See id.*

104. *See id.* at 1173-74 (discussing the initial success regarding free movement of capital under Article 67, and the subsequent stagnation). The first directive adopted, Directive 921/60, initially implemented Article 67. Its effect was later expanded by Directive 63/21. *Id.* Both directives focused on liberalizing commercial capital flows. *Id.* at 1174.

restrictive measures designed to protect the functioning of the Member States' capital markets.[105] Such an exception was susceptible to broad application, which in fact occurred throughout the economic turmoil of the 1970s and 1980s.[106] Moreover, because of this limitation, in *Casati*[107] the Court declined to interpret Article 67 as one having direct effect.

In contrast to the original treatment of capital in Article 67 of the Treaty of Rome, the amended Treaty now states: "[A]ll restrictions on the movement of capital between Member States . . . shall be prohibited."[108] Despite the initial appearance of clarity and objectivity of the exceptions to the freedom, which are detailed in Article 58, subsequent judicial analysis has demonstrated that some ambiguity remains as to the extent and nature of these exceptions, particularly that relating to public security.[109] Notably, the Court has imported

105. *See id.* at 1173 (detailing the various articles within the chapter on capital movements in the original EEC Treaty).

106. *See id.* at 1174 (discussing the frequency of Commission authorization for restrictive schemes throughout the two decades).

107. Case 203/80, Criminal Proceedings Against Casati, 1981 E.C.R. 2595, ¶¶ 11-12, [1982] 1 C.M.L.R. 365 (1981), ¶¶ 11-12.

108. EC Treaty art. 56(1). The Treaty still permits a few restrictions, however, which are expressly set out in Article 58(1). *See* EC Treaty art. 58. Article 58(1)(a) provides an exemption for restrictions imposed to distinguish between taxpayers based on residence. *See* EC Treaty art. 58(1)(a). Article 58(1)(b) exempts restrictions imposed to "prevent infringements of national law" specifically, laws relating to taxation and supervision of financial institutions, as well as those procedures requiring declaration of capital movements, where the purpose is explicitly administrative or for gathering statistical information. EC Treaty art. 58(1)(b). Article 58(1)(b) also includes an exception for public security or public policy. *Id.* The exceptions detailed in Article 58 are narrower than those found elsewhere in the Treaty, which systematically also include public health (clearly of limited relevance to capital movements). *See* Flynn, *supra* note 65, at 796. However, the chapter of the Treaty on free movement of goods also contains a public morality exception, and the freedom of establishment and the right to provide services each include an exception for the exercise of official authority. *See* EC Treaty arts. 45, 55. Both exceptions could also have been inserted in Article 58. It is not impossible to imagine a nation regulating investment in sectors which may be closely connected with morality, such as lotteries and gambling. *Cf.* Case C-275/92, Her Majesty's Customs & Excise v. Schindler, 1994 E.C.R. I-1039, ¶¶ 60-61, [1995] 1 C.M.L.R. 4 (1994), ¶¶ 60-61 (determining that legislation which allows small scale lotteries, but prohibits larger ones is an acceptable restriction on the freedom to provide services, because "it is not possible to disregard the moral, religious or cultural aspects of lotteries, like other types of gambling, in all the Member States").

109. For example, the Court must still interpret which activities are meant to fall into the public security realm. There is little doubt that activities surrounding national security are exempted. *See* EC Treaty art. 296(1)(b). However, there are other activities which are also vital to public security, and the Court has begun to identify these through case law. *See* Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 34, [1984] 3 C.M.L.R. 544 (1984), ¶ 34 (finding that protecting petroleum supplies is vital to the public security); Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46 (holding that protection of energy supplies is analogous to protecting petroleum supplies).

from the sector of services and establishment doctrines the notion of "overriding national interests" as an acceptable reason to restrict capital movements.[110] However, as illustrated by the golden share cases, what constitutes an overriding national interest is not well defined and is open to varying interpretations, thus introducing more uncertainty and allowing the use of more subjective criteria in evaluating the justification of a Member State restriction.[111]

Over time, the Court has developed an impressive body of case law from which to draw upon when evaluating infringements of EU law and Treaty obligations.[112] In 2002 alone the Court heard 513 cases.[113] Decisions pertaining to the fundamental freedoms account for a substantial percentage of the ECJ's recent judgments.[114] In 2002, the Court handed down many decisions relating to the free movement of capital,[115] as well as numerous decisions regarding infringements of the right of establishment.[116] In order to better comprehend the Court's reasoning in the golden share cases, a basic understanding of judicial interpretation of the free movement of capital and the freedom of establishment is necessary. This Comment now describes that judicial interpretation.

B. *The Coming of Age of Capital and Establishment Case Law*

The use of golden shares implicates two fundamental freedoms: the free movement of capital and the freedom of establishment. Therefore, principles from both bodies of law are relevant in analyzing golden share restrictions.

1. Interpretation of Article 43: The Freedom of Establishment

Freedom of establishment, detailed in Article 43, "include[s] the right to take up and pursue activities as self employed persons and to

110. *See, e.g.*, Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 49, [2002] 2 C.M.L.R. 48 (2002), ¶ 49. The notion of "overriding requirements of the general interest" (also referred to as requirements of the national interest) was brought to capital case law from the right of establishment, which had borrowed it from free movement of goods. See *supra* notes 70-77 and accompanying text for a discussion of the extension of "overriding national interests" from the case law of the right to provide services into the related right to establishment. *See also* Bermann et al., *supra* note 36, at 676 (noting that the concept of a national interest exception was extended to the free movement of services in *In re Insurance Services* from free movement of goods, specifically, from *Cassis de Dijon*).

111. For more detailed discussion of the Court's evaluation of potentially restrictive measures, see *infra* Part II.

112. Though the ECJ does not have a doctrine of stare decisis, "the Court does follow its previous decisions in almost all cases." Hartley, *supra* note 41, at 75.

113. *See* 2002 Annual Report, *supra* note 42, at 158.

114. *See id.* at 161. In 2002, it was nineteen percent. *Id.*

115. There were twenty-four such judgments in 2002. *See id.*

116. Eleven judgments pertaining to the freedom of establishment were handed down in 2002. *See id.*

set up and manage undertakings"[117] as well as enabling nationals of any Member State to establish "agencies, branches or subsidiaries"[118] throughout the Community. Freedom of establishment covers investments as well,[119] and thus is closely related to the free movement of capital.[120] Not surprisingly, an infringement of one is often linked with an infringement of the other.[121] Since the Treaty of Maastricht, the ECJ has applied the laws governing the two freedoms in parallel.[122]

The provisions of Article 43 apply to investments which grant control of a company, but do not apply to those which represent a passive investment, such as one taken for portfolio diversification. However, the actual line between a purely passive investment and an investment with control rights is sometimes difficult to draw, and no clear answer exists.[123] Advocate General[124] ("A.G.") Alber addressed

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117. EC Treaty art. 43.

118. *Id.*

119. *See generally* Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 33, [2002] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 33 (discussing the difficulty in drawing a line between an investment which is a capital flow, and an investment which falls into the right of establishment).

120. *See id.* ¶ 13. The distinction between the two freedoms is difficult to draw specifically because they are often intertwined. The acquisition of company shares obviously requires a capital movement, but can easily also involve establishment, particularly if the acquisition is great enough to give the purchaser some control rights vis-à-vis the company. Kronenberger likens the purchase of company shares to the purchase of real estate, which also, by its very nature, requires a movement of capital in order to achieve an establishment (in that case, the real estate). Kronenberger, *supra* note 13, at 127. Though Kronenberger notes that the wording of the Treaty chapter on capital movements seems to imply that the two freedoms should not be applied concurrently, he recognizes that this is by no means clear. *Id.* Notably, A.G. Alber argues that the rules of both freedoms can, and in some instances, should, be applied together. *See id.* at 129-30; *see also supra* Part I.B.3.

121. *See, e.g.*, Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, ¶¶ 10, 15 (finding infringements of both freedom of establishment and free movement of capital where a Luxemburg regulation precluded interest rate subsidies for those who take a loan from an institution which was not one approved in Luxemburg); *see also* Flynn, *supra* note 65, at 788; Kronenberger, *supra* note 13, at 127.

122. *See* Case C-251/98, *Baars*, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 15, [2000] 1 C.M.L.R. 49, Opinion of A.G. Alber, ¶ 15. See *infra* Part I.C.3. for a discussion of how and why the Court usually opts to apply the law pertaining to either the free movement of capital or the freedom of establishment, but not both, when infringements of both are alleged.

123. *See, e.g.*, Flynn, *supra* note 65, at 788 ("When distinguishing between the internal market freedoms, the line dividing establishment and capital is the hardest of all to draw.").

124. The role of the Advocate General ("A.G.") is unparalleled in the U.S. system. An A.G. is a legal professional having the same rank as an ECJ judge. *See* EC Treaty art. 222. The A.G. derives his power directly from the Treaty: "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it." *Id.* Though

this issue in *Baars*,[125] which involved a Dutch decision to deny a tax exemption to a Dutch national for his investment in an Irish enterprise, of which he was the sole shareholder.[126] Though Dutch law provided for just such an exemption, when Baars applied the exemption to his taxes, it was denied.[127] The Dutch government argued that the specific tax provision in question was intended to prevent the double taxation of a sole shareholder who would have to pay both the wealth tax and the company tax.[128] Baars challenged the denial on two grounds: It infringed upon freedom of establishment and also on the free movement of capital.[129] The Commission and the Dutch government disagreed as to which rule was truly applicable,[130] which is not surprising, as the law implicated both freedoms.

Advocate General Alber ultimately determined that the line between a capital movement and the right of establishment was "at the point where a shareholder ceases to confine himself to the mere provision of capital in support of a particular business activity carried on by another person, and begins to become involved himself in conducting the business."[131] Of course, where the shareholder is merely providing capital, his rights are still protected under Article 56.[132] Because golden shares often limit the number of shares which an individual can hold precisely because a large holding may permit—and in practice often does permit—the investor to have some influence, the right of establishment is certainly at issue.[133]

For this reason, the development of EU law regarding the freedom of establishment has implications for the golden share cases. The

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the A.G. hears the case alongside the Court, he does not take part in its deliberations, and his opinion is separate from that of the Court. *See* Hartley, *supra* note 41, at 54-56. The A.G.'s opinion is rendered before the Court issues its decision, and the Court takes it into consideration in its deliberations. *Id.* The Court is not obligated to follow the A.G.'s opinion, but the A.G.'s opinion carries much weight, and even where not adopted by the Court in the specific case, these opinions are influential in the development of future Community law. *See id.*; Bermann et al., *supra* note 36, at 61-62 (discussing the Advocate General's role and qualifications).

125. Case C-251/98, *Baars*, 2000 E.C.R. I-2787, Opinion of A.G. Alber, [2002] 1 C.M.L.R. 49, Opinion of A.G. Alber.

126. *Id.* ¶¶ 1-3.

127. *Id.* ¶¶ 5-6.

128. *Id.* ¶ 7.

129. *Id.* ¶ 10.

130. *Id.* ¶ 11.

131. *See id.* ¶ 33.

132. *See* EC Treaty art. 56 (prohibiting any restriction on capital movements).

133. *See* Case C-251/98, *Baars*, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 50, [2002] 1 C.M.L.R. 49, Opinion of A.G. Alber, ¶ 50:

> [I]f the holding in a company reaches a size which enables the investor to exercise a decisive influence over the undertaking's decision-making, the right of establishment will supplement free movement of capital. Such an investment would then additionally fulfill the criteria set out in Article 52(2), and would be protected by the EC Treaty under two separate heads.

Id.

Court's approach to establishment cases imports much from recognized principles involving the free movement of services.[134] Specifically, the notion that only those regulations necessitated by national interests can justify a restriction of a fundamental freedom was carried over from precedent regarding freedom of services.[135] Thus, the Court imported the test it applied to freedom of establishment in *Gebhard*[136] from previous case law on free movement of services.[137]

Gebhard discussed the right of establishment as relating to self-employed persons, specifically a lawyer attempting to establish himself in another Member State.[138] In evaluating an Italian law which restricted Gebhard's ability to open a legal practice in Milan, the Court held:

> [N]ational measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it.[139]

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134. *See supra* notes 70-77 and accompanying text (discussing the development of the general good exception in the free movement of goods sector, and its subsequent application in freedom of services and establishment cases).

135. *See* Bermann et al., *supra* note 36, at 669 (explaining "this doctrine is not only crucial in the area of free movement of services, but has now been carried over to the right of establishment"). *Compare* Case C-58/98, Proceedings Against Corsten, 2000 E.C.R. I-7919, ¶ 35 (holding that, in the context of movement of services and the right of establishment, where the host state's interest is not protected by the rules governing the service provider in his home state, any regulation in the host state which restricts the freedom must be "based only on rules justified by overriding requirements relating to the public interest"), *with* Case C-279/80, Criminal Proceedings Against Webb, 1981 E.C.R. 3305, ¶ 17, [1982] 1 C.M.L.R. 719 (1981), ¶ 17 (finding that the freedom to provide services, as a fundamental freedom, can only be obstructed by rules "justified by the general good").

136. Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995).

137. *See* Case 205/84, Commission v. Germany (*In re* Insurance Services), 1986 E.C.R. 3755, ¶ 33, [1987] 2 C.M.L.R. 69 (1986), ¶ 33.

> [T]here are imperative reasons relating to the public interest which may justify restrictions on the freedom to provide services, provided, however, that the rules of the State of establishment are not adequate in order to achieve the necessary level of protection and that the requirements of the State in which the service is provided do not exceed what is necessary in that respect.

Id. There are similarities between *In re Insurance Services* and *Corsten*. *See supra* note 135. *In re Insurance Services* borrowed from *Cassis de Dijon*, wherein the Court noted the "imperative requirements" exception. *See supra* notes 70-77 and accompanying text.

138. Case C-55/94, *Gebhard*, 1995 E.C.R. I-4165, ¶ 2, [1996] 1 C.M.L.R. 603, ¶ 2.

139. *Id.* ¶ 39.

The Court has applied this four-prong test in many cases involving a restriction of a fundamental freedom.[140]

The Court applies the wording of Article 43 literally, and will not permit restrictions which violate the letter of its text. *Centros Ltd. v. Erhvervs-Og Selskabsstyrelsen*,[141] involved Denmark's refusal of Centros's application to register a branch in Denmark because Centros, though incorporated in the U.K., did not actually conduct business in the U.K. The sole purpose for Centros's incorporation in the U.K. was to evade the Danish paid-in capital requirements.[142] For this reason, Denmark believed that refusing to allow registration did not violate the right of establishment.[143] In finding that the refusal

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140. Though not always explicitly identified as such, the Court often considers these four conditions in evaluating a restriction of a fundamental freedom. *See, e.g.*, *id.* ¶ 37 (freedom of establishment); *see also* Case C-212/97 Centros Ltd. v. Erhvervs-Og Selskabsstyrelsen, 1999 E.C.R. I-1459, ¶ 34, [1999] 2 C.M.L.R. 551 (1999), ¶ 34. (freedom of establishment); Case C-153/02, Neri v. Eur. Sch. of Econ., 2003 E.C.R. ___, ¶¶ 45-46, *available at* http://www.curia.eu.int/en/content/juris/index.htm (free movement of persons); Case C-215/01, Criminal Proceedings Against Schnitzer, 2003 E.C.R. ___, ¶ 17, 2003 WL 100051 (E.C.J. Dec. 11, 2003) (free movement of services); Case C-367/98 Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 49, [2002] 2 C.M.L.R. 48 (2002), ¶ 49 (free movement of capital). Advocates General have also widely adopted the four-part test. *See* Case C-309/99, Wouters v. Algemene Raad van de Nederlandse Orde van Avocaten, 2002 E.C.R. ___, Opinion of A.G. Leger, ¶ 249, [2002] 4 C.M.L.R. 27 (2002), Opinion of A.G. Leger, ¶ 249 (freedom of establishment); Case C-424/97, Haim v. Kassenzahnärztliche Vereinigung Nordrhein, 2000 E.C.R. I-5123, Opinion of A.G. Mischo, ¶ 103, [2002] 1 C.M.L.R. 11 (2000), Opinion of A.G. Mischo, ¶ 103 (freedom of establishment); Case C-120/95, Decker v. Caisse de Maladie des Employés Privés, 1998 E.C.R. I-1831, Opinion of A.G. Tesauro, ¶ 45, [1998] 2 C.M.L.R. 879 (1998), Opinion of A.G. Tesauro, ¶ 45 (free movement of goods and free movement of services).

141. Case C-212/97, *Centros*, 1999 E.C.R. I-1459, [1999] 2 C.M.L.R. 551.

142. *Id.* ¶¶ 13, 23. Danish law required a certain minimum amount of capital be paid into a company as a pre-requisite to incorporation (presumably intended as a protective measure for investors), whereas the U.K. does not have the same mandate for limited liability companies. Therefore, incorporating in the U.K. saved the shareholder 200,000 Danish kroner. *See id.* ¶ 7.

143. Denmark argued that Centros's actions fell within the "*van Binsbergen* exception." The so-called *van Binsbergen* exception provides that a Member State may

> take measures to prevent the exercise by a person providing services whose activity is entirely or principally directed towards its territory of the freedom guaranteed by Article 59 for the purpose of avoiding the professional rules of conduct which would be applicable to him if he were established within that State.

Case 33/74, van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299, ¶ 13, [1975] 1 C.M.L.R. 298 (1974), ¶ 13; *see* Case C-148/91, Vereniging Veronica Omroep Organisatie v. Commissariaat voor de Media, 1993 E.C.R. I-487, ¶¶ 12-14 (finding acceptable, based on the *van Binsbergen* exception, a Dutch law which prohibited domestically established broadcasting organizations from participating in the establishment of broadcasting organizations in other Member States which would direct broadcasts into the Netherlands, where the establishment of the second broadcast organization is done to evade Dutch regulations regarding the non-commercial character of programs, and types of broadcast content). Finding that the Danish law failed to satisfy the four conditions

violated Centros's right of establishment, the Court noted that "[t]he right to form a company in accordance with the law of a Member State and to set up branches in other Member States is inherent in the exercise, in a single market, of the freedom of establishment guaranteed by the Treaty."[144] If the company was not violating the law of the nation in which it was established, its intent to evade certain obligations of the company law of another Member State was unimportant and the literal application of Article 43 demanded this result.[145]

2. Article 56—The Free Movement of Capital

Before 1994, Member States were under no absolute obligation to "open up their frontiers to capital from other Member States."[146] Prior to the amendments adopted in Amsterdam, the ECJ considered that EC Article 67 did not itself accomplish the free movement of capital, but rather required legislative implementation.[147] Thus Article 67 urged liberalization of capital movements, but did not have direct effect; rather it required legislation to impose measures loosening such restrictions.[148] Two directives issued in the early 1960s

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required for a restriction of a fundamental freedom, the Court determined that the refusal to register the branch infringed upon the right of establishment. Case C-212/97, *Centros*, 1999 E.C.R. I-1459, ¶¶ 30, 39, [1999] 2 C.M.L.R. 551, ¶¶ 30, 39.

144. Case C-212/97, *Centros*, 1999 E.C.R. I-1459, ¶ 27, [1999] 2 C.M.L.R. 551, ¶ 27.

145. *See id.* ¶ 26.

> The provisions of the Treaty on freedom of establishment are intended specifically to enable companies formed in accordance with the law of a Member State and having their registered office, central administration or principal place of business within the Community to pursue activities in other Member States through an agency, branch or subsidiary.

Id. ¶ 26.

146. Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, Opinion of A.G. Saggio, ¶ 2; *see also supra* Part I.B.

147. See Hartley, *supra* note 41, at 199-200 (noting that, at least as originally understood, the Treaty authors did not intend directives to have direct effect, but rather required national legislation be enacted for their implementation). For a discussion of the Court's role in the expansion of direct effect, see *id.* at 199-204.

148. *See generally* Joined Cases 286/82 & 26/83, Luisi & Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, ¶¶ 27-33, [1985] 3 C.M.L.R. 52 (1984), ¶¶ 27-33 (recognizing that Article 67 does not require full liberalization of capital flows and that Member States may still impose restrictions on capital movements); Case 203/80, Criminal Proceedings Against Casati, 1981 E.C.R. 2595, ¶ 10, [1982] 1 C.M.L.R. 365 (1981), ¶ 10 (noting that unlike the Treaty provisions on the free movement of goods, persons and services, capital movements, under Article 67 need only be liberalized to the extent necessitated by the functioning of the common market). The Court addressed the issue of whether or not Article 67 had direct effect in *Casati*. In *Casati*, an Italian national who resided in Germany was prevented from exporting a large sum of Italian currency pursuant to Italian law which capped the export of national currency (at that time, Lira) at 500,000. *Id.* ¶ 4. In March of 1981, the equivalent of ITL 500,000 was approximately $500. *See Currencies, Money and Gold*, Fin. Times, Mar. 2, 1981, at 18 (showing the range at which the Italian Lira traded against the U.S. dollar on March 2). Casati argued that Article 67 had direct effect, and therefore he challenged the

implemented Article 67.[149] Together, they liberalized the most common forms of both commercial and private capital movements.[150]

Prior to the Treaty of Maastricht and the launch of the "internal market project," there was little case law regarding the free movement of capital as an independent right.[151] That is not to say that Article 67 imposed no duty on Member States to liberalize capital movements[152]—particularly where capital movement was linked to the exercise of the other fundamental freedoms, the Court did not permit excessive restriction.[153]

In 1985, the Commission released a White Paper on Completing the Internal Market, which advocated even greater liberalization of capital movements.[154] After the White Paper, efforts to achieve free movement of capital were renewed.[155] Thus, in 1988, the Council

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Italian law as contrary to the Treaty. Case 203/80, *Casati*, 1981 E.C.R. 2595, ¶ 6, [1982] 1 C.M.L.R. 365, ¶ 6. The Court noted that capital movements are also "closely connected with the economic and monetary policy of the Member States" and therefore "it cannot be denied that complete freedom of movement of capital may undermine the economic policy of one of the Member States or create an imbalance in its balance of payments, thereby impairing the proper functioning of the Common Market." *Id.* ¶ 9. Because Article 67(1) included the clause "to the extent necessary to ensure the proper functioning of the Common Market," EC Treaty art. 67(1) (repealed by the Treaty of Amsterdam), the Court determined that free movement of capital was conditional, and therefore, Article 67 required legislation for implementation. *See id.* ¶¶ 10-12.

149. Council Directive 60/921, 1960 O.J. (L 43) 921; Council Directive 63/21, 1963 O.J. (L 9) 62.

150. *See* Council Directive 60/921, annex I, 1960 O.J. (L 43) 921 (listing capital movements covered by the first directive); Council Directive 63/21, annex I, 1963 O.J. (L 9) 62 (amending the first directive and adding to the list of capital movements to be liberalized). Most financial and banking transactions were not freed, however. *See* Bermann et al., *supra* note 36, at 1173-74 (discussing the first and second directives and the initial success of the efforts to liberalize capital movements).

151. *See* Flynn, *supra* note 65, at 773.

152. *See generally* Joined Cases 286/82 & 26/83, Luisi & Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, [1985] 3 C.M.L.R. 52 (1984) (finding that restricting the exportation of currency cannot be permitted where the currency is a payment needed to exercise another fundamental freedom).

153. In *Luisi & Carbone* the Court found that an Italian law which forbade Italians from taking more than a small amount of Italian currency out of the country impermissibly restricted Treaty-created freedoms. *Id.* ¶ 37. Luisi wanted to take enough currency to pay for medical treatment in another Member State, and Carbone wished to travel in other Member States with enough money to cover his traveling and tourism expenses. *See id.* ¶¶ 3-4. The Court determined that currency being taken out of the nation to pay for tourism and medical treatment did not fit the definition of a capital movement, but was rather a current payment for services. *Id.* ¶¶ 22-24. Since free movement of services did have direct effect, the Court determined that the removal of currency from a Member State for the purpose of paying for services in another must be allowed without limitation. *See, e.g.*, Bermann et al., *supra* note 36, at 1175 (analyzing the Court's reasoning in *Luisi & Carbone*).

154. Completing the Internal Market: White Paper from the Commission to the European Council, COM(85)310 final at 33-34 [hereinafter Completing the Internal Market].

155. *See generally* Bermann et al., *supra* note 36, at 1175-76 (discussing the 1985

issued Directive 88/361/EEC to address the issue.[156] Prior to Directive 88/361/EEC, restricting capital flows was the norm for some Community members.[157] The purpose of the directive was to accomplish the absolute liberalization of capital flows: "Member States shall abolish restrictions on movements of capital taking place between persons resident in Member States."[158] The directive was subject to certain exceptions which included allowing measures required to protect bank liquidity and protective measures against short term capital movements which would threaten the Member State's foreign exchange balance.[159] The Directive included an illustrative list of what would constitute a capital movement; the list included direct investments,[160] and the Directive achieved free movement of capital upon the expiration of the stated implementation period,[161] but it was not until the Treaty was amended in Amsterdam that free movement of capital was elevated to a "constitutional" right by adoption of Article 56.[162] Article 56 mandates that "all restrictions on the movement of capital between Member States and between Member States and third countries shall be prohibited."[163] The Commission has continued to make free movement of capital a priority in recent years.[164]

Article 56 liberalizes both capital flows and payments, but for the purposes of golden shares, only the movement of capital is relevant. Capital movements are "those resources used for, or capable of, investment intended to generate revenue."[165] In the Commission's view, direct investments—included in the definition of capital laid out in Directive 88/361/EEC—are to be treated as a capital movement,

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White Paper and the subsequent adoption of the 1988 Directive).

156. Council Directive 88/361, 1988 O.J. (L 178) 5.

157. *See* Bermann et al., *supra* note 36, at 1172-73 (noting that while some Member States, such as the Netherlands and Germany permitted liberal movement of capital, others, specifically France, Italy, Greece, Spain and Portugal, were much more restrictive); *see generally* Kronenberger, *supra* note 13, at 123; *see also* Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 23, [2000] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 23.

158. Council Directive 88/361, art. 1, 1988 O.J. (L 178) 5, 6.

159. *Id.* at 6.

160. *Id.* at 11.

161. *See, e.g.*, Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, ¶ 6 ("It should be noted in that regard that restrictions on movements of capital were abolished by Council Directive 88/361/EEC of 24 June 1988.").

162. *See* Kronenberger, *supra* note 13, at 123 (noting the elevation of free movement of capital to "constitutional" status).

163. EC Treaty art. 56, ¶ 1; *see also* Kronenberger, *supra* note 13, at 124 (discussing the effect of adopting Article 56).

164. *See generally* Kronenberger, *supra* note 13, at 124 ("From approximately ten judgments between 1957 and 1993, the Court delivered 17 judgments directly concerning capital movements between 1994 and 2002.").

165. Flynn, *supra* note 65, at 776.

and thus protected by the Treaty.[166] The Court has also adopted this view, accepting the definition as appropriate.[167]

The ECJ has defined the reach of this freedom broadly: In *Svensson & Gustavsson*[168] the ECJ held that legislation which "[is] of a nature to dissuade individuals"[169] from the exercise of their Treaty rights is restrictive.[170] A law which has the potential to restrict an investment is therefore contrary to the obligations of Article 56.[171] In *Trummer & Mayer* the Court held that a law permitting only mortgages backed in Austrian shillings to be recorded constituted a restriction in the free movement of capital.[172] Fearing that such a requirement would inhibit the exercise of free movement of capital, the Court declared it incompatible with Treaty law.[173] Thus, not only would the Court disallow direct restrictions, but it would also strike down measures which may indirectly restrict the free movement of capital as well.[174]

Not long after the amendments in Maastricht mandated the free movement of capital, the Court held that free movement of capital had direct effect.[175] In *Sanz de Lera*,[176] the Court reviewed a Spanish law which required prior authorization for the exportation of currency over a certain value.[177] First, the Court determined that requiring

166. *See* Communication, *supra* note 20, ¶¶ 3, 8.

167. *See, e.g.*, C-222/97, *In re* The Application to Register Land by Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 21, [2000] 3 C.M.L.R. 1143 (1999), ¶ 21 ("[T]he nomenclature in respect of movements of capital annexed to Directive 88/361 still has the same indicative value, for the purposes of defining the notion of capital movements, as it did before the entry into force of [Article 56] *et seq.*").

168. Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955.

169. *See* Flynn, *supra* note 65, at 779 (stating that the "starting-point for the identification of a restriction is *Svensson & Gustavsson*).

170. *See* Case C-484/93, *Svensson & Gustavsson*, 1995 E.C.R. I-3955, ¶ 10.

171. *See* Kronenberger, *supra* note 13, at 125.

172. Case C-222/97, *Trummer & Mayer*, 1999 E.C.R. I-1661, ¶ 34, [2000] 3 C.M.L.R. 1143, ¶ 34.

173. The law did not per se forbid people from holding mortgages backed by other currencies, *id.* ¶ 5, but did forbid the registration of such mortgages, and the Court found that the inability of people to record those mortgages might deter them from obtaining such mortgages, *id.* ¶ 34. The regulation might impair the free movement of capital because "rules are liable to dissuade the parties concerned from denominating a debt in the currency of another Member State, and may thus deprive them of a right which constitutes a component element of the free movement of capital and payments." *Id.* ¶ 26.

174. *See id.* ¶ 26.

175. *See* Joined Cases C-163/94, C-165/94 & C-250/94, Criminal Proceedings Against Sanz de Lera & Others, 1995 E.C.R. I-4821, ¶ 43, [1996] 1 C.M.L.R. 631 (1995), ¶ 43 (holding that Article 73 (now 56) confers rights on individuals upon which they may rely).

176. *Id.*

177. *Id.* ¶¶ 5-6. Any individual taking more than PTA 1,000,000 out of the country was required to obtain prior authorization for its removal. *Id.* ¶ 6. As of December 14, 1995, that equaled approximately $8,300. *Currency and Money*, Fin. Times, Dec. 14, 1995, at 34.

consent from governmental authorities effectively gave those authorities discretionary powers over whether to restrict the free movement of capital.[178] Permitting the freedom to be dependent upon the discretion of an administrative authority is "such as to render that freedom illusory."[179] Despite the validity of the purpose of the scheme—to prevent illegal activity such as money laundering—the Court held that the means chosen were not proportionate.[180] Because the Spanish government could have achieved its objective with less restrictive means, by instead implementing a system of prior declaration,[181] the Court held that the principle of proportionality was not met.[182] Thus, the holding of *Sanz de Lera* was very important in the golden share cases, for it illustrated that any acceptable restrictive scheme must be the least restrictive means by which to achieve the stated objective.[183] The Court applies this principle of proportionality[184] whenever a fundamental freedom is restricted, from the free movement of goods in *Cassis de Dijon*,[185] to the right to provide services in *In re Insurance Services*.[186] *Sanz de Lera* established the importance of the principle in the context of capital movements.

Despite such broad interpretations, it is also clear that the protection against restrictions is not absolute. Thus, even where there is a valid justification under the EC Treaty, the Court will scrutinize a national law which infringes upon a fundamental freedom.[187] Certain principles must be met in order to permit a restriction. Using the four

178. Joined Cases C-163/94, C-165/94 & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4821, ¶¶ 24-25, [1996] 1 C.M.L.R. 631, ¶¶ 24-25.

179. *Id.* ¶ 25.

180. *Id.* ¶¶ 26-28.

181. *See id.*

182. *Id.* ¶¶ 22-23 (stating that since Spain's objective can justify a restriction in the free movement of capital, it is necessary to determine if it is using the least restrictive means possible to meet that goal). The principle of proportionality is one of several foundational general principles of law that the ECJ has adopted which allow the Court's review to have more bite. *See generally* Bermann et al., *supra* note 36, at 31, 171-79 (presenting the case law pertaining to the development of the principle of proportionality); *see also infra* notes 188-91 and accompanying text.

183. *See* Joined Cases C-163/94, C-165/94 & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4821, ¶¶ 27-29, [1996] 1 C.M.L.R. 631 (1995), ¶¶ 27-29.

184. *See infra* note 191 and accompanying text (defining proportionality).

185. Case 120/78, Cassis de Dijon, 1979 E.C.R. 649, [1979] 3 C.M.L.R. 494 (1979).

186. Case 205/84, Commission v. Germany (*In re* Insurance Services), 1986 E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69 (1986), ¶ 27.

187. *See generally* Case C-302/97, Konle v. Republik Österreich, 1999 E.C.R. I-3099, ¶¶ 37-40, [2000] 2 C.M.L.R. 963 (1999), ¶¶ 37-40 (examining an Austrian law which had an acceptable objective—town and country planning—but nonetheless was unacceptable); Case C-423/98, Alfredo Albore, 2000 E.C.R. I-5965, ¶¶ 18-19, [2002] 3 C.M.L.R. 10 (2000), ¶¶ 18-19 (considering an Italian law which might be justified based on the public security exception, but which appeared to be unnecessarily restrictive).

step analysis developed in *In re Insurance Services*,[188] carried over to the right of establishment in *Gebhard*,[189] the Court first examines if the objective is acceptable. If it is, the means implemented must still be limited in scope so as to not go beyond what is needed to achieve them.[190] This is the principle of proportionality.[191]

The Court has found that some restrictions might be within the parameters permitted by the Treaty, though such instances are rare.[192] For example, the ECJ interpreted the scope of Article 58's public security exception in *Albore*.[193] An Italian law forbade the sale of land to foreign nationals where the land was located in an area decreed by the Minister of Defense to be one of military importance.[194] Despite the Court's recognition of a public security exception under Article 58, it held that the infringing law must still meet the principle of proportionality.[195] In order to satisfy the requirements for such an exception, the threat posed by foreign ownership of the land in question must be "real, specific and serious"[196] as well as one which could not "be countered by less restrictive procedures."[197] Not having sufficient factual information regarding the specific nature of the threat to the public security by foreign ownership of the coastal land, the Court left it to the Italian court to determine whether such a threat existed, and, if it did, whether the measure was as minimally restrictive as possible in addressing it.[198]

In *Konle v. Austria*[199] the Court considered a law mandating prior authorization for non-nationals wishing to purchase land in the Tyrol (Alpine) region of the country, which was of environmental concern.[200] The stated purpose of the law in question was for the

188. Case 205/84, *In re Insurance Services*, 1986 E.C.R. 3755, ¶ 27, [1987] 2 C.M.L.R. 69, ¶ 27.

189. Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995).

190. *See* James Hanlon, European Community Law 67 (2d ed. 2000).

191. *See generally id.* Hanlon notes that the principle of proportionality, though similar to the U.S. "reasonableness" test, is a more rigorous inquiry. *Id.* The principle is embodied in Article 5 of the EC Treaty. EC Treaty art. 5 ("Any action by the Community shall not go beyond what is necessary to achieve the objectives of the Treaty."). For a more comprehensive analysis of the principle of proportionality, as well as examples of its application in various sectors of Community law, see Hanlon, *supra* note 190, at 67-70.

192. The Treaty expressly permits some restrictions. *See supra* notes 108-09 and accompanying text.

193. Case C-423/98, Alfredo Albore, 2000 E.C.R. I-5965, [2002] 3 C.M.L.R. 10 (2000).

194. *Id.* ¶ 5.

195. *Id.* ¶¶ 19, 24.

196. *Id.* ¶ 22.

197. *Id.*

198. *Id.* ¶ 23.

199. Case C-302/97, Konle v. Republik Österreich, 1999 E.C.R. I-3099, [2000] 2 C.M.L.R. 963 (1999).

200. *Id.*

general national interest of urban planning.[201] While the Court accepted that such an environmental concern was valid,[202] it reiterated the principle that "[a] procedure of prior authorisation . . . which entails, by its very purpose, a restriction on the free movement of capital, can be regarded as compatible with Article 73b [now 56] of the Treaty only on certain conditions."[203] Austria had secured a derogation to maintain discretionary rules regarding the acquisition of secondary residences in its accession agreement.[204] The purpose of the restriction, though not one explicitly condoned in Article 58, was considered an imperative interest, and thus could, under the right circumstances, justify some restriction.[205]

However, since the specific law that prohibited Konle's purchase was not one which had existed at the date of accession, but rather was a replacement (and significantly different)[206] law for one which had subsequently been declared unconstitutional, it was not covered by the derogation.[207] Because the system of review in place was not proportionate to the purpose of the restriction, it conflicted with Treaty obligations.[208]

In *Église de Scientologie* the Court evaluated a French law that required prior authorization for any foreign investment which might be connected to the exercise of public authority, or which might pose a threat to public policy, health or security.[209] The Court determined that a system of prior authorization is per se restrictive,[210] and, to be acceptable, such a system must clearly delineate the criteria required for authorization.[211] The French law in question was neither specific

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201. *See id.* ¶ 37.

202. *See generally id.* ¶ 40.

> [A] Member State can justify its requirement of prior authorisation by relying on a town and country planning objective such as maintaining, . . . a permanent population and an economic activity independent of the tourist sector in certain regions, the restrictive measure inherent in such a requirement can be accepted only if [certain conditions are met].

Id.

203. *See id.* ¶ 39. Those conditions are that the measure be non-discriminatory, necessary and proportionate. *See id.* ¶¶ 40, 42.

204. *See id.* ¶¶ 14, 25. The derogation allowed Austria to continue to apply restrictions which existed at the time of accession, even those which were applicable only to foreigners. *See id.* ¶¶ 22-25.

205. *See id.* ¶ 40 (finding that certain goals of town and country planning can fall within the general interest and thus justify restrictive measures, provided that the measures are proportionate and do not go beyond what is necessary to achieve the objective).

206. *See id.* ¶¶ 53-54.

207. *Id.* ¶ 54.

208. *Id.* ¶ 56.

209. Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335.

210. *See id.* ¶ 14.

211. *See id.* ¶¶ 21-22.

nor clear enough to permit such broad restrictions.[212] However, the Court did state that there may be cases where a system of prior declaration is not sufficient to safeguard the interests of public policy or public security, and a system of prior authorization may be acceptable.[213] Thus, the Court left some hope for the defense of such schemes in the future.

But *Église* also shows that this is a high burden to meet. The law must relate to a "genuine and sufficiently serious threat"[214] and indicate to investors the specific circumstances in which prior authorization is needed.[215] Legal certainty is required so as to apprise individuals as to the extent of any rights and duties that they have under the Treaty.[216]

3. Which Freedom to Use?

The Court often develops a test for one freedom, and extends its application to another when an appropriate case is brought.[217] Thus, some important doctrines apply to several, or all, fundamental freedoms.[218] In some cases more than one Treaty obligation is at

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212. *Id.* The French law in question was very broad, and required a foreign investor to get prior authorization from the Minister in charge of the Economy for any investment in an endeavor which was involved, even occasionally, with the exercise of official authority, or which might threaten public policy, security or health. *Id.* ¶ 7. The Court noted that in order for an activity to qualify for inclusion in the public policy, health or security exception there must be a "sufficiently serious threat to a fundamental interest of society," and that such determination could not be made unilaterally by a Member State. *Id.* ¶ 17.

213. *See id.* ¶ 19.

214. *Id.* ¶ 20.

215. *Id.* ¶ 21.

216. *Id.* ¶ 22. *Église de Scientologie* holds:

> Article 73d(1)(b) of the EC Treaty must be interpreted as precluding a system of prior authorisation for direct foreign investments which confines itself to defining in general terms the affected investments as being investments that are such as to represent a threat to public policy and public security, with the result that the persons concerned are unable to ascertain the specific circumstances in which prior authorisation is required.

Id. Legal certainty, like proportionality, is a general principle of Community law, and is therefore always a consideration. *See* Hartley, *supra* note 41, at 142. It requires that laws be predictable and certain, thus providing notice as to what satisfies the law. *Id.* For further discussion on the principle of legal certainty, see *id.* at 142-47.

217. *See* Flynn, *supra* note 65, at 804-05. Flynn notes that in five years, the Court has developed capital law as fully as the law pertaining to other freedoms, which took thirty years to develop. Because the Court does take from one to apply to another, this huge development with regard to capital movement will impact the Court's analysis of violations of other freedoms. *Id.* The Court is able to, and will, "pick elements from the case law on capital and to relay echoes from it in those fields." *Id.* at 805; *see also supra* notes 134-40 and accompanying text (noting the development of the four-prong test in the services case law and its subsequent utilization in establishment case law and discussing the extension of the concept of "overriding national interests" from free movement of goods to services and establishment).

218. *See supra* notes 70-77 and accompanying text.

issue, and it is unclear which body of law the Court will apply.[219] Frequently there is overlap between free movement of capital and the freedom of establishment.[220] In such instances, the law relating to either freedom may be applied.[221] Compounding the confusion is the clause in Article 43 that states that the freedom of establishment is "subject to the provisions of the Chapter relating to capital."[222] Likewise, Article 58 includes the reservation that the Chapter on capital "shall be without prejudice to the applicability of restrictions on the right of establishment."[223] This may imply that protection is only extended to one freedom where both are implicated, but as Advocate General Alber noted in *Baars*:

> [T]he reservations do not signify that conduct can be protected only under one of these fundamental freedoms. Were any reference to capital movements ipso facto to preclude application of the chapter on the freedom of establishment, that fundamental freedom would lose any practical meaning, since establishment in another Member State generally involves a transfer of capital.[224]

Certainly, the Court only addresses those questions that are presented. However, as is evident from the golden share cases, the Court is selective about which law it uses to ground its decision. In *Baars*, Advocate General Alber suggested:

> (1) where the free movement of capital is directly restricted such that only an indirect obstacle to establishment is created, only the rules on capital movements apply; (2) where the freedom of establishment is directly restricted such that the ensuing obstacle to establishment leads indirectly to a reduction of capital flows between Member States, only the rules on the freedom of establishment apply . . . ; (3) where there is direct intervention affecting both the free movement of capital and the freedom of establishment, both fundamental freedoms apply, and the national measure must satisfy the requirements of both.[225]

Theoretically this is a sound formula, but in practice the line may be more difficult to draw. Accordingly, the Court has often avoided the issue by making a decision on one of the freedoms, and not addressing the other, even if it is raised.[226]

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219. *See, e.g.*, Flynn, *supra* note 65, at 788-91.
220. *See generally id.*
221. *See id.*
222. EC Treaty art. 43.
223. EC Treaty art. 58.
224. Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 13, [2002] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 13.
225. Kronenberger, *supra* note 13, at 129-30.
226. *See* Flynn, *supra* note 65, at 789. Flynn notes that the Court followed the same pattern in *X & Y v. Riksskatteverket*, Case C-200/98, X & Y v. Riksskatteverket, 1999 E.C.R. I-8261, where "it ruled that, in the absence of justification, such a difference of

In the past, the Court pragmatically opted to decide only the establishment issue, because "once an incompatibility appears to arise, [regarding the right of establishment] there is no purpose in examining the implications of the provisions on capital."[227] Now that there is a wealth of capital case law,[228] the Court has declined to address the freedom of establishment issue in any of the golden share cases.[229]

It seems the Court bases its rulings on the law most amenable to the precise issue at bar. The Court logically relied on its existing precedent in deciding the golden share cases.[230] There were other options, however: In the opinions presented by Advocate General Ruiz-Jarabo Colomer in each of the golden share cases, he advocated analysis under the right of establishment.[231] Ruiz-Jarabo Colomer found that in the golden share cases the restriction of the free movement of capital was incidental to the restriction on the freedom of establishment.[232] This is similar to A.G. Alber's line-drawing

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treatment is contrary to the rules on freedom of establishment and that it was not necessary to examine whether the rules on free movement of capital preclude legislation such as that in question in the main proceedings." Flynn, *supra* note 65, at 789 (paraphrasing *X & Y*, at ¶¶ 28, 30). *But see* Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955 (discussing both the freedom of establishment and the free movement of capital issues).

227. Flynn, *supra* note 65, at 804.

228. See *id. passim* for an excellent discussion of the development of case law pertaining to the free movement of capital.

229. *See* Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 86, [2003] 2 C.M.L.R. 18 (2003), ¶ 86; Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. I-4641, ¶ 52, [2003] 2 C.M.L.R. 19 (2003), ¶ 52; Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 56, [2002] 2 C.M.L.R. 48 (2002), ¶ 56; Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶ 56, [2002] 2 C.M.L.R. 49 (2002), ¶ 56; Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 59, [2002] 2 C.M.L.R. 50 (2002), ¶ 59. While this frustrates the inquiry as to the actual format of analysis the Court would apply, this Comment presumes that the conclusion would be the same in these cases.

230. Since the adoption of Article 56, a number of cases in the capital sector have been decided that provided a suitable framework for considering the acceptability of restrictive golden shares. *See* Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335; Case C-302/97, Konle v. Republik Österreich, 1999 E.C.R. I-3099, [2000] 2 C.M.L.R. 963 (1999); Joined Cases C-163/94, 165/94, & 250/94, Criminal Proceedings Against Sanz de Lera & Others, 1995 E.C.R. I-4821, [1996] 1 C.M.L.R. 631 (1995).

231. Joined Cases C-463/00, Commission v. Spain, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), & Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 36; Joined Cases C-367/98, Commission v. Portugal, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), C-483/99, Commission v. France, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), & C-503/99, Commission v. Belgium, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 21.

232. Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & Case C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 36.

formula in *Baars*,[233] where he concluded that the appropriate rules to apply were those relating to establishment, because Baars' owned *all* of the shares in a company.[234] This indicates that some cases infringe both freedoms, and the reason for the Court's application of one body of law over another may be apparent only by considering the development of relevant precedent.

C. *The 1997 Communication*

Since the mid-1990s, the Commission has made it clear that it will not tolerate restrictions on the free movement of capital and freedom of establishment.[235] In fact, in 1997, the Commission issued a Communication which unambiguously stated its position on Article 56, expressly "indicat[ing], to national authorities and economic operators in Member States" how it interprets Articles 43 and 56.[236] Because acquiring a controlling stake in a company is considered a capital movement,[237] Article 56 must be considered with regard to investment. Additionally, such acquisitions are "also covered under the scope of the right of establishment,"[238] thus also requiring compatibility with Article 43. Therefore, the Commission, at least, recognizes that golden share devices, which directly or indirectly regulate the acquisition of shares, implicate both Treaty rights.[239]

The National Treatment Principle prohibits discriminatory treatment of the nationals of other Member States.[240] The principle has always been a part of the Treaty; initially embodied in Article 7, and now in Article 12: "Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited."[241] Only in very limited circumstances can any law which violates this principle be acceptable.[242] Because a discriminatory regulation unequivocally

233. *See supra* note 225 and accompanying text.

234. Case C-251/98, Baars v. Inspecteur der Belastingen Particulieren/Ondernemingen Gorinchem, 2000 E.C.R. I-2787, Opinion of A.G. Alber, ¶ 34, [2002] 1 C.M.L.R. 49 (2000), Opinion of A.G. Alber, ¶ 34 ("The distinction in question presents no problems in the present case. It is clear that the situation is one of establishment, since all the shares are owned by one person.").

235. *See, e.g.*, Communication, *supra* note 20, at ¶ 1.

236. *Id.* ¶ 2.

237. *Id.* ¶ 3.

238. *Id.* ¶ 4.

239. *See id.* ¶¶ 6-9.

240. EC Treaty art. 12. Though not expressed in the treaty, Article 12 mandates non-discrimination based on nationality, and thus requires that a citizen from another Member State be treated equivalently to a citizen of the Member State in question. The Court has interpreted this to be a "general doctrine of equality." Hartley, *supra* note 41, at 130. The National Treatment terminology comes from GATT. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 3, 61 Stat. A-11, A-18, 55 U.N.T.S. 188, 204-06.

241. EC Treaty art. 12.

242. *See* Communication, *supra* note 20, ¶¶ 5(i)-7. The Commission recognized

conflicts, not only with provisions in the Treaty, but with the underlying purpose of the EU,[243] such measures presumptively infringe upon Treaty obligations.[244] Such measures can only co-exist with Treaty obligations if they are one of the few exceptions explicitly granted by the Treaty itself.[245]

Regulations that are non-discriminatory on their face are also scrutinized carefully, though the criteria are slightly more ambiguous, leaving more to the court's discretion.[246] Applying by analogy judicial doctrines that were developed to limit Member State restrictions on the free movement of services[247] and the right of establishment,[248] the Commission argued, and the Court has held, that such laws must meet four conditions.[249] First, they must not be applied discriminatorily.[250] Second, the law must achieve "imperative requirements in the general interest."[251] Third, the measure must be appropriate for attaining the

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that discriminatory measures which were related to activities connected with "official authority" might be accepted. *Id.* ¶ 5(i). Note, however, that the very narrow applicability of the "official authority" exception ensures that such measures have rarely been accepted. *See, e.g.*, Case 2/74, Reyners v. Belgian State, 1974 E.C.R. 631, ¶ 54, [1974] 2 C.M.L.R. 305 (1974), ¶ 54. Additionally, the Commission recognized that when a regulation discriminated on the basis of nationality and was justifiable under explicit Treaty exceptions—public security, health or policy—it might be acceptable, though "these exceptions have to be understood in a narrow sense . . . and exclude any interpretation based on economic considerations." *Communication*, *supra* note 20, ¶ 5(i).

243. *See* EC Treaty pmbl. (stating that the Community was created because the Members were "[determined] to lay the foundations of an ever closer union among the peoples of Europe, . . . [recognising] that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition").

244. *See* Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 41, [2002] 2 C.M.L.R. 48 (2002), ¶ 41.

245. *See* Communication, *supra* note 20, ¶ 5; *see also supra* notes 82-85 and accompanying text (discussing the specific exceptions to the prohibition on restriction of the freedom of establishment); *supra* note 108 and accompanying text (identifying the Treaty exceptions permitting restrictions of the free movement of capital).

246. *See generally* Communication, *supra* note 20, ¶ 9 ("[T]hey are permitted in so far as they are based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest. In all cases, the principle of proportionality has to be respected.").

247. *See* Case 205/84, Commission v. Germany (*In re* Insurance Services), 1986 E.C.R. 3755, [1987] 2 C.M.L.R. 69 (1986).

248. *See* Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995).

249. Communication, *supra* note 20, ¶ 5(ii).

250. *Id.*

251. *Id.* The Commission draws upon the Court's analysis in previous case law pertaining to the free movement of services and the right of establishment. *Cf.* Case C-55/94, *Gebhard*, 1995 E.C.R. I-4165, ¶ 37, [1996] 1 C.M.L.R. 603, ¶ 37 (reiterating the four conditions necessary for a restriction on a fundamental freedom, the second of which is that the measure "must be justified by imperative requirements in the general interest"); Case 33/74, van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid, 1974 E.C.R. 1299, [1975] 1 C.M.L.R. 298 (1974), (finding that the Dutch refusal to permit a Dutch legal representative, residing in Belgium, to

objective.[252] Finally, the regulation must not impose any restriction beyond that which is necessary to achieve the objective.[253]

The Commission also recognized that Article 296(1)(b) generates a clear and overriding exception.[254] Article 296 unequivocally permits Member States to implement regulations needed "for the protection of the essential interests of its security... connected with the production of or trade in arms, munitions and war material."[255] However, the Commission expressed reliance on the continued narrow interpretation of this caveat by the ECJ, and remained confident that this exception would not become "a general proviso covering all measures taken for reasons of public security."[256]

The Commission applied this interpretation to various mechanisms currently in place in some Member States to determine compatibility with EU law.[257] Essentially, the Commission declared that any scheme requiring prior authorization for an investment, any retention of state veto rights over important company decisions, or the right to appoint directors to a company's board were inherently incompatible with the obligations of Articles 56 and 43, and therefore could only be acceptable in narrowly defined situations.[258] All of these objectionable measures are common devices employed when Member States use golden shares.[259]

The Commission's interpretation of the relevant Treaty Articles provided the basis for initiating the six golden share cases.[260] The choice to privatize a previously state owned enterprise remains the decision of the Member State.[261] However, what the golden share

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represent a client in an administrative proceeding was acceptable due to the specific nature of the service provided).

252. Communication, *supra* note 20, ¶ 5(ii).

253. *Id.*

254. *Id.* ¶ 5(i).

255. EC Treaty art. 296(1)(b).

256. Communication, *supra* note 20, ¶ 5(i).

257. *Id.* ¶¶ 7-8.

258. *Id.* ¶ 8.

259. *See infra* Part II (discussing the various golden share mechanisms which have come before the ECJ).

260. *See* EC Treaty art. 226. Article 226 provides the procedure for the Commission to initiate proceedings against a Member State before the ECJ.

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> ... If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Id.

261. Communication, *supra* note 20, n.1 (noting that such a decision is an "economic policy choice which ... falls within the exclusive competence of Member States"); *see also* EC Treaty art. 295 (previously Art. 222) ("This Treaty shall in no

cases prove is that, post-privatization, Member States do not have free rein to regulate those companies in a manner inconsistent with the free movement of capital and the freedom of establishment.

This Communication expressed the opinion of the Commission, and was not binding law.[262] Actual rules pertaining to such matters "should be left for Parliament and the Council, acting on a proposal from the Commission."[263]

By the end of the 1990s, efforts to further integrate the internal market and eliminate—or at least diminish—measures designed to inhibit cross-border company activity were increased.[264] The Commission began initiating actions against Member States using restrictive protective devices, such as golden shares. The obvious restrictive nature[265] of golden shares made them uniquely vulnerable to challenge.

II. THE GOLDEN SHARE CASES

This part discusses the six golden share cases in turn. Each case provides unique insight into the Court's method of interpreting Treaty law and building upon precedent. Furthermore, analyzing each case in turn demonstrates how these cases incrementally defined the scope of the free movement of capital.

Even before the commencement of infringement proceedings related to golden shares, commentators criticized golden shares for their "sweeping legal nature."[266] Despite the recent judicial activity,[267]

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way prejudice the rules in Member States governing the system of property ownership.").

262. The Commission does not have the ability to create binding law. For a discussion of the Commission's role in the EU, see Bermann et al., *supra* note 36, at 42-51; Hartley, *supra* note 41, at 11-17.

263. Eur. Parl. Doc. O.J. 2002 (C 21E) 338, 339 (Minutes, Apr. 5, 2001). The European Parliament has asked the Commission to stop using the Communication alone as the basis for the infringement proceedings against Member States and urged it to replace the Communication with a proposed directive. *Id.* at 339 ("Calls on the Commission to cease using the abovementioned communication as the basis for its infringement procedures and immediately to propose a directive to replace the abovementioned communication.").

264. In 2001 the Commission set up a High Level Group of Company Law Experts to advise it on a suitable framework for Community company law. *See* High Level Group of Company Law Experts, Report on a Modern Regulatory Framework for Company Law in Europe 1 (Nov. 4, 2002), *available at* http://europa.eu.int/comm/internal_market/en/company/company/modern/index.htm [hereinafter High Level Group Report (November)]. In addition to the report on company law, the Group prepared a report on takeover law as well. *See* High Level Group of Company Law Experts, Report on Issues Related to Takeover Bids 1 (Jan. 10, 2002) *available at* http://europa.eu.int/comm/internal_market/en/company/company/news/02-24.htm [hereinafter High Level Group Report (January)].

265. See *supra* notes 12-27 and accompanying text for a discussion of the various ways in which golden shares protect a company or governmental interest by implementing restrictions on a number of activities.

266. Kronenberger, *supra* note 13, at 123.

golden shares are still quite common throughout the EU,[268] and thus an analysis of the Court's decisions will assist in predicting the nature of the Court's scrutiny and the outcome of future cases.

The 1988 Directive included direct investments in the illustrative list of operations to be liberalized,[269] which was subsequently understood to have been incorporated into Article 56.[270] For the purposes of the directive, direct investments are defined as:

> Investments of all kinds by natural persons or commercial, industrial or financial undertakings, and which serve to establish or to maintain lasting and direct links between the person providing the capital and the entrepreneur to whom or the undertaking to which the capital is made available in order to carry on an economic activity. This concept must therefore be understood in its widest sense.[271]

A golden share, by its very nature, potentially restricts investments.[272] In some cases, the golden share sets caps on the amount of shares that an individual may own.[273] In others, the government maintains such a level of control as to render the investment less attractive.[274] In recent years, the Court has had the

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267. *See infra* Parts II.B., II.C.

268. For example, there are an additional twenty-five in the U.K. alone. *See, e.g.*, Terry Macalister, *Ruling Leaves UK Firms Vulnerable*, The Guardian, May 14, 2003, at 18, *available at* LEXIS News Library, Guardian File. See *infra* Part III.A. for a discussion of the pending cases and potential cases.

269. *See* Council Directive 88/361 for the Implementation of Article 67 of the Treaty, 1988 OJ (L 178) 5, 8-11; *see also* Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, Opinion of A.G. Saggio, ¶ 3.

270. *See supra* note 167 and accompanying text.

271. Council Directive 88/361 for the Implementation of Article 67 of the Treaty, 1988 O.J. (L 178) 5, 11; *see also* Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶ 6, [2002] 2 C.M.L.R. 49 (2002), ¶ 6.

272. *See supra* notes 13-29 and accompanying text.

273. *See* Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 9, [2003] 2 C.M.L.R. 18 (2003), ¶ 9 (noting the provision in Spanish law 5/1995 which allows the state to require ministerial authorization before any person or legal entity acquires more than ten percent of a recently privatized company's voting shares); Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. I-4641, ¶ 11, [2003] 2 C.M.L.R. 19 (2003), ¶ 11 (discussing article 40(1) of the Articles of Association of the British Airports Authority which prevents persons from acquiring more than fifteen percent of the voting shares); Case C-483/99, *France*, 2002 E.C.R. I-4781, ¶ 9, [2002] 2 C.M.L.R. 49, ¶ 9 (discussing the French requirement that prior authorization must be obtained before any person or legal entity acquires more than one-fifth, one-tenth, or one-third of the voting rights in Elf-Aquitaine); Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 11, [2002] 2 C.M.L.R. 48 (2002), ¶ 11 (noting that Article 13(3) of Portuguese Law No. 11/90 permits the government to limit the total number of shares held by foreigners in certain designated companies).

274. *See, e.g.*, Câmara, *supra* note 12, at 504.

opportunity to evaluate both of these schemes.[275] Because the movement of capital is at issue, there are only a few permissible justifications for any restriction, and the Court has also begun to identify which motives can be acceptable.[276]

A. Commission v. Italy

In May 2000, the Court decided the first of the golden share cases.[277] An Italian law required that, prior to relinquishing control of any state controlled company operating in certain sectors, a provision be installed to reserve certain powers to the Minister of the Treasury.[278] These special powers in effect constitute a golden share retained by the state. The government reserved the right to appoint at least one director to the board and the ability to veto certain company decisions.[279] The government inserted these provisions into the statutes of ENI SpA, STET SpA and Telecom Italia SpA.[280] The companies operated in the energy sector (ENI) and the telecommunications sector (STET and Telecom Italia).[281]

Following the necessary procedure, the Commission brought the case to the ECJ, pursuant to Article 226.[282] Before the Court, the

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275. See *infra* Part II.A.-C. for a discussion of the six cases in which the court has evaluated various golden share schemes, and its determination of which motivations can be acceptable.

276. *See* Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809 (permitting the use of the Belgian golden share); Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 71 (identifying certain industries which might merit some protective measures). Because the principles of proportionality and legal certainty are general legal principles of the Community, they apply in all circumstances. For a comprehensive discussion of the origin and application of general principles of Community law, see Hartley, *supra* note 41, at 130-54. Thus, only those schemes which ensure the protection interest of the affected investor can be justified. Such safeguards include judicial review, precisely worded restrictions, and specific constraints on the governmental restriction. *See, e.g.*, Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶¶ 48-52, [2002] 2 C.M.L.R. 50 (2002), ¶¶ 48-52 .

277. *Belguim*, 2002 E.C.R. I-4809, ¶¶ 48-52, [2002] 2 C.M.L.R. 50, ¶¶ 48-52.

278. *See id.* ¶ 3.

279. *Id.*

280. *Id.* ¶¶ 5-6.

281. Though the specific industries involved were unimportant in this case, retrospectively, it is possible that Italy might have successfully defended the system as necessary for the protection of overriding reasons in the national interest, because the Court has since stated that both sectors are important enough to justify restricting a fundamental freedom. *See* Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 71, [2003] 2 C.M.L.R. 18 (2003), ¶ 71 (noting that protecting the telecommunications industry may constitute a valid public security justification for restricting the free movement of capital); *see also* Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46 ("[T]he safeguarding of energy supplies in the event of a crisis . . . falls undeniably within the ambit of a legitimate public interest."). Of course, the regulation would still have to be proportionate. *See, e.g.*, Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶ 18.

282. Case C-58/99, *Italy*, 2000 E.C.R. I-3811, ¶¶ 7-11; *see also* EC Treaty art. 226.

Commission argued that the law conflicted with Treaty obligations and failed to meet the necessary four conditions, as outlined in the 1997 Communication.[283] Furthermore, the Commission argued that the law gave the Italian government too much discretion, and therefore the ability to apply the law in an arbitrary and discriminatory manner.[284]

Here, the Italian government conceded that Law No. 474 was incompatible with the law of the European Community.[285] Accordingly, the Court had no need to scrutinize the law to determine whether it actually restricted capital movements or establishment, or if any such restriction was in fact impermissible. But the Court did not have to wait long before the issue again appeared.

B. *The Original Golden Share Cases*

On June 4, 2002, the ECJ decided three cases regarding the use of golden shares.[286] The Court's analysis of the various forms of the golden shares outlines the basic structure of the current test of golden share compatibility with Community law.[287] Each case resolves different and important issues.

Before rendering its decision, the Court considered the opinion of Advocate General Ruiz-Jarabo Colomer,[288] who recommended that the Court dismiss the Commission's actions against the non-discriminatory measures of Portugal, Belgium, and France.[289] The

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Article 226 provides the proper procedure for the Commission to bring an action before the ECJ:

> If the Commission considers that a Member State has failed to fulfil an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.
>
> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

Id. Thus, the Commission sent a formal notice to the Italian Republic, informing it that in the Commission's opinion, the law violated Articles 43, 49, and 56. Case C-58/99, *Italy*, 2000 E.C.R. I-3811, ¶ 7. After receiving a response from the Italian government, the Commission sent a reasoned opinion, giving Italy two months to comply. *Id.* ¶ 8. Italy failed to respond within the time limit. *Id.* ¶¶ 9-10.

283. See *supra* note 20 and text accompanying note 249.

284. *See* Case C-58/99, *Italy*, 2000 E.C.R. I-3811, ¶ 13.

285. *Id.* ¶ 14.

286. Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, [2002] 2 C.M.L.R. 48 (2002); C-483/99, Commission v. France, 2002 E.C.R. I-4781, [2002] 2 C.M.L.R. 49 (2002); C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50 (2002).

287. *See generally* Fleisher, *supra* note 19.

288. *See supra* note 124 (explaining the role of the A.G.). For a more complete discussion of the A.G.'s opinion in the golden share cases, see *infra* Part II.D.

289. Joined Cases C-367/98, Commission v. Portugal, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), C-483/99, Commission v. France, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), & C-503/99, Commission v. Belgium, 2002 E.C.R. ___, [2002] 2

A.G. relied primarily on Article 295, which asserts that the Treaty laws do not prejudice the property law of the Member States.[290] Company shares and the rights which they entail are property.[291] The Court, however, did not agree, and only briefly addressed the Advocate General's argument before swiftly rejecting it, noting that Member States' systems of property ownership are not exempt from Treaty rules.[292] The Court cited one of its important precedents, *Factortame II*, to show that Member States may only exercise the powers that they retain consistently with Community law.[293]

1. *Commission v. Portugal*

The Commission's strongest case was against the Portuguese golden share rules.[294] The Portuguese law in question established a framework for all privatizations.[295] One objective of the law was "to permit widespread participation by Portuguese citizens in the share capital of undertakings."[296] Presumably to further that goal, Article 13(3) of Law No. 11/90 was discriminatory on its face, allowing legislation to "limit the overall amount of shares which may be acquired or subscribed for by foreign entities."[297] The Commission brought the action to challenge specific decree laws, three of which implemented a discriminatory measure.[298] Additionally, the Commission objected to certain decree laws which, though not facially discriminatory, nonetheless restricted free movement of capital by limiting to ten percent the total number of shares any individual or entity could legally hold without government authorization.[299]

C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 92. One of the laws in question capped the amount of voting shares any single person (or legal entity) could own at ten percent. This law applied irrespective of the shareholder's nationality, and applied to any "single, natural or legal person." *Id.* ¶ 14.

290. EC Treaty art. 295.

291. *See generally* Joined Cases C-367/98, *Portugal*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 92.

292. Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 48, [2002] 2 C.M.L.R. 48, ¶ 48.

293. *See* Case C-221/89, The Queen v. Sec'y of State for Transp., *ex parte* Factortame Ltd., 1991 E.C.R. I-3905, ¶¶ 16-17, [1991] 3 C.M.L.R. 589, ¶¶ 16-17 [hereinafter *Factortame II*] (noting that Member States may implement registration requirements for vessels in so far as they do not conflict with International law or EU law).

294. *See* Joined Cases C-367/98, *Portugal*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 22.

295. *See* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶¶ 10-14, [2002] 2 C.M.L.R. 48, ¶¶ 10-14.

296. *Id.* ¶ 10 (quoting Article 3 of Law No. 11/90).

297. *Id.*

298. *See id.* ¶ 13.

299. *See id.* ¶ 14.

Regarding the discriminatory aspect of the Portuguese law in question, the Commission's argument followed the rationale of the 1997 Communication.[300] First, the Commission contended that the true purpose behind such protective measures was to control intra-Community investment.[301] The Commission further noted that discriminatory measures are clearly incompatible with Article 43 and Article 56, unless they are within one of the express exceptions.[302] The Portuguese government contended that since it had endeavored "as a matter of policy, not to use the powers conferred on it by those provisions,"[303] Portugal had not in practice violated its obligations under the EC Treaty.[304]

As for the non-discriminatory measures, the Commission again referred to the 1997 Communication,[305] claiming that the measures were incompatible with Community law. Only those laws which are "based on a set of objective and stable criteria which have been made public and can be justified on imperative requirements in the general interest"[306] and which meet the principle of proportionality,[307] can be accepted.[308] The Commission contended that Portugal did not meet these requirements.[309] Portugal argued that (a) the scheme was applied to both foreigners and nationals, and was therefore non-discriminatory, and (b) the measures were justified by "overriding requirements of the general interest."[310] Portugal asserted that safeguarding its nation's financial interests was an imperative national interest,[311] which justified a restriction of the freedom of establishment and the free movement of capital.

The Court disregarded entirely A.G. Ruiz-Jarabo Colomer's analysis of Article 295,[312] and instead evaluated the national measures under Article 56.[313] The Court seized upon this opportunity to formulate an appropriate structure of analysis for golden share restrictions based on the free movement of capital. First, the Court noted that Article 56 bars such restrictions.[314] *Trummer & Mayer*

300. *See* Communication, *supra* note 20.
301. Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 20, [2002] 2 C.M.L.R. 48, ¶ 20.
302. *Id.* ¶ 22 (citing Communication, *supra* note 20).
303. *Id.* ¶ 29.
304. *Id.*
305. *Id.* ¶ 22 (quoting Communication, *supra* note 20, ¶ 9).
306. *Id.*
307. *See supra* note 191 and accompanying text.
308. *See* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 22, [2002] 2 C.M.L.R. 48, ¶ 22 (quoting Communication, *supra* note 20, ¶ 9).
309. *See id.* ¶¶ 23-27.
310. *Id.* ¶ 31.
311. *Id.* ¶ 32.
312. *Id.* ¶ 28 ("Article 222 [now Article 295] of the Treaty is irrelevant in the present case.").
313. *See id.* ¶¶ 36-54.
314. *Id.* ¶ 36.

clearly held that such a restriction need not have a direct restrictive effect; it is enough that the measure may indirectly hinder the free movement of capital.[315]

The Court then addressed the discriminatory aspects of the measure. The Court rejected Portugal's argument that because the discriminatory rules were not actually used they did not violate Article 56,[316] because such a policy failed to meet the principle of legal certainty.[317] Portugal's practice "cannot be regarded as constituting the proper fulfilment of a Member State's obligations under the Treaty, since they maintain, for the persons concerned, a state of uncertainty."[318] Thus, an administrative policy of not applying an existing measure discriminatorily was not a valid defense to an alleged breach of EC Treaty obligations.[319] This remains well-settled Community law.[320]

Next the Court evaluated the non-discriminatory measure embedded in Decree-Law No. 380/93, which required prior authorization before an individual or entity could hold shares totaling more than ten percent of the voting capital.[321] Having already dealt with systems of prior authorization in *Sanz de Lera*[322] and *Église de Scientologie*,[323] the Court had a well-developed body of law from which to draw.

Without hesitation, the Court dismissed Portugal's argument that

315. *See* Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 26, [2000] 3 C.M.L.R. 1143 (1999), ¶ 26 (holding that measures which may deter investment, even if they do not prohibit or directly restrict it, violate Article 56).

316. *See generally* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 41, [2002] 2 C.M.L.R. 48, ¶ 41.

317. *Id.*

318. *Id.*

319. *See id.* ¶¶ 41-42. Interestingly, in earlier days, the Commission seemed to accept such promises not to use discriminatory measures which existed. *See* Graham & Prosser, *supra* note 8, at 151. In the days of the EEC, the Commission objected to France's attempt to limit a sale resulting in foreign ownership to fifteen percent but accepted a limit of twenty percent on the condition that such limits would not be enforced against other members of the Community. Though this specifically applied to the original sale of the company, the golden share was inserted to ensure adequate State control in the post-privatization period. *Id.* at 151-52.

320. *See, e.g.*, Case 167/73, Commission v. France, 1974 E.C.R. 359, ¶¶ 47-48, [1974] 2 C.M.L.R. 216 (1974), ¶¶ 47-48 (holding that even though a French requirement that at least seventy-five percent of the crew on some vessels be French was not applied against nationals of other Member States, the wording of the regulation created uncertainty, and thus France had failed to meet its obligation of free movement of workers).

321. *See* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶¶ 43-44, [2002] 2 C.M.L.R. 48, ¶¶ 43-44 (declining to accept Portugal's argument that because the measure is not discriminatory, it is acceptable).

322. Joined Cases C-163/94, C-165/94, & C-250/94, Criminal Proceedings Against Sanz de Lera & Others, 1995 E.C.R. I-4821, [1996] 1 C.M.L.R. 631 (1995). See *supra* notes 175-86 and accompanying text for a discussion of *Sanz de Lera*.

323. Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335; *see also supra* notes 209-16 and accompanying text.

because the measure did not discriminate based on nationality, it was compatible with the Treaty.[324] Article 56 does not permit such restrictions.[325] Any rule with the potential to dissuade investors from other Member States from investing is "liable . . . to render the free movement of capital illusory,"[326] and as such is incompatible with Article 56. This is firmly settled case law.[327]

Since no blanket rule permits non-discriminatory restrictions, the Court considered whether the scheme in question fulfilled the requirements of any of the express exceptions of Article 58,[328] or could be justified by some "overriding requirements of the general interest."[329] The Court found that the statute was not justified by any overriding need in the general interest, since "general financial interests of a Member State cannot constitute adequate justification."[330] Therefore, the scheme failed to meet the acceptable justification condition.

The Court did not need to evaluate whether the measure was proportionate and narrowly tailored to meet the objective, but briefly discussed both legal certainty and proportionality.[331] The Court was not swayed by the argument that the "administrative decisions had to be reasoned"[332] because knowledge of the criteria ex post facto failed to meet the burden of legal certainty.[333] As for the principle of proportionality, the Court declared that a system of ex-post facto declaration would have to be completely incapable of achieving the objective in order for a system of prior authorization to ever be acceptable.[334]

Portugal was the least complicated of the three golden share cases decided on June 4, 2002.[335] The first law challenged was

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324. Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 44, [2002] 2 C.M.L.R. 48, ¶ 44.

325. Article 56 permits no restrictions on either capital or payment flows between Member States and Member States and third parties. EC Treaty art. 56.

326. Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 45, [2002] 2 C.M.L.R. 48, ¶ 45.

327. See *supra* Part I.C.2.; *see also* Joined Cases C-163/94, C-165/94, & C-250/94, *Sanz de Lera*, 1995 E.C.R. I-4821, [1996] 1 C.M.L.R. 631 (1995).

328. Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 49, [2002] 2 C.M.L.R. 48, ¶ 49.

329. *Id.*

330. *Id.* ¶ 52. A long line of cases establishes this concept. *See* Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶ 17; Case C-484/93, Svensson & Gustavsson v. Ministre du Logement et de l'Urbanisme, 1995 E.C.R. I-3955, ¶¶ 13-14; Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 35, [1984] 3 C.M.L.R. 544, ¶ 35 (1984) (noting that safeguarding petroleum supplies is not a purely economic motive, and can therefore be acceptable).

331. *See* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶¶ 49-50, [2002] 2 C.M.L.R. 48, ¶¶ 49-50.

332. *See* Câmara, *supra* note 12, at 508.

333. *See supra* note 216 and accompanying text (defining legal certainty).

334. *See* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 50, [2002] 2 C.M.L.R. 48, ¶ 50.

335. *See* Joined Cases C-367/98, Commission v. Portugal, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), C-483/99, Commission v. France, 2002 E.C.R. ___, [2002] 2

discriminatory on its face, and thus could only be allowed to stand under extremely limited circumstances, none of which were presented by the Portuguese.[336] The second law, which applied to all persons wanting to purchase shares with a voting weight of more than ten percent, failed the first of the four necessary conditions,[337] as the objective could not justify a restriction of a fundamental freedom.[338] The harder questions, those relating to proportionality and necessity, did not need to be addressed.

2. *Commission v. France*

The question of proportionality became the pivotal issue in the second case decided by the Court on June 4, 2002.[339] At issue in the Commission's case against France was the golden share which reserved certain rights to the Minister of Economic Affairs.[340] Post-privatization legislation created a golden share in *Société Nationale Elf-Aquitaine* ("SNEA"). Specifically, the statute granted the Minister the right to oppose company decisions regarding the disposal of assets and to appoint two members to the board of directors.[341] Even more troubling was the obligation imposed upon any investor wishing to purchase more than a certain number of shares to obtain prior approval of the Minister.[342] It was this scheme of prior authorization which was the focus of the Commission's case against France.[343] The Commission, as required by procedure, notified France that it believed the requirement to be contrary to EC law. The French, fearing foreign control over the petroleum supplies, were not willing to forgo the golden share entirely.[344]

The Court first assessed whether the golden share that France reserved in SNEA posed a restriction on the movement of capital.[345] Like the Portuguese, the French argued that the measure was not

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C.M.L.R. 48 (2002), & C-503/99, Commission v. Belgium, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 22.

336. See *supra* notes 82-85, 95-96, 108-10 and accompanying text for a discussion of exceptions under which a restriction of the free movement of capital and freedom of establishment may be imposed.

337. *See supra* notes 139-40 and accompanying text.

338. *See generally* Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48, ¶ 52 (asserting that Portugal's motive was purely economic, and thus did not justify restricting capital movements).

339. *See id.* ¶ 53.

340. *See id.* ¶ 14.

341. *Id.* ¶ 9. It should be noted that the two members appointed by the Minister did not have voting rights. *Id.*

342. *Id.*

343. *Id.* ¶¶ 21-24.

344. *Id.* ¶¶ 14-15 (stating that France would require pre-authorization only where holdings in excess of the maximum share limits might threaten petroleum supplies and that safeguarding such supplies was an important objective).

345. *Id.* ¶¶ 38-43.

contrary to Article 56 because it was non-discriminatory,[346] but again, the Court found no merit in this argument.[347] Any measure which has the potential to deter investment by nationals of other Member States might make free movement of capital "illusory," and is thus contrary to Community law.[348] Therefore, for the French golden share to comply with Article 56, it had to be justified either by an explicit Treaty exception or by "overriding requirements of the general interest."[349] Moreover, even if the objective justified the restriction, the system of prior authorization must be the least restrictive means of achieving that goal.[350]

The French, unlike the Portuguese, satisfied the first condition: In 1984, in *Campus Oil*, the Court had determined that

> petroleum products . . . are of fundamental importance for a country's existence since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants depend upon them. An interruption of supplies of petroleum products . . . could therefore seriously affect the public security.[351]

Thus the objective of safeguarding the nation's petroleum supplies is a legitimate national interest,[352] and can justify some restriction of capital movements.[353] The Commission itself conceded that the objective might, under the right circumstances, merit a restriction.[354]

Accepting this,[355] the Court examined the scope of the scheme utilized.[356] Because the use of the public security exception requires that there be a "genuine and sufficiently serious threat,"[357] a Member State may adopt only those measures which are absolutely necessary to secure against the threat.[358] Finding that the French system of prior authorization offered investors no "indication whatever as to the specific, objective circumstances in which prior authorisation will be

346. *Id.* ¶ 39.
347. *Id.* ¶ 40.
348. *Id.* ¶ 41.
349. *Id.* ¶ 45; *see also* Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶¶ 17-18.
350. *See generally Association Église de Scientologie de Paris*, 2000 E.C.R. I-1335, ¶ 20.
351. *See* Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 34, [1984] 3 C.M.L.R. 544 (1984), ¶ 34. In *Campus Oil*, the Court scrutinized Irish rules which were adopted to ensure that Ireland's only oil refinery was not closed, which would have had the effect of making the nation entirely dependent upon foreign oil supplies. In the wake of the energy crisis of the 1970s, the Irish government was reluctant to allow that to happen. *See id.* ¶¶ 5-7.
352. *See id.* ¶ 35.
353. *Id.*
354. Case C-483/99, *France*, 2002 E.C.R. I-4781, ¶ 26, [2002] 2 C.M.L.R. 49, ¶ 26.
355. *Id.* ¶ 47.
356. *See id.* ¶ 47.
357. *Id.* ¶ 48.
358. *See id.* ¶ 49.

granted or refused,"[359] the Court decided that the lack of transparency and legal certainty provided too much discretionary power, and was therefore not proportionate to the stated purpose.[360] As with the system of prior authorization that the Court denied in *Église de Scientologie*,[361] the French golden share system lacked the requisite specificity and failed to adequately indicate to investors when prior authorization would be granted or denied. As such, the restriction violated Article 56 of the EC Treaty.

The most important aspect of *France* was the Court's acknowledgment that some important national interests could necessitate restricting the free movement of capital and the freedom of establishment.[362] Furthermore, the judgment made clear the absolute importance of transparency and proportionality. Though this is a high standard, the final judgment on golden shares handed down on June 4, 2002 proved that it is not an impossible standard to meet.

3. *Commission v. Belgium*

The third, and arguably most important,[363] case was that against Belgium. At issue were two Royal Decrees, each of which vested a golden share in the government.[364] In the Royal Decree of June 10 1994, a golden share was granted in the *Société Nationale de Transport par Canalisations* ("SNTC").[365] Another Royal Decree on June 16, 1994 vested in the state a golden share in *Société de Distribution du Gaz SA* ("Distrigaz").[366] Both enterprises were involved in the gas and energy distribution sector.[367] The golden shares granted were very similar, reserving to the state: (1) the right to be notified of any transfer, sale, or use as collateral of the company's strategic assets,[368] and (2) the right to appoint two members to the board of directors who could in turn suggest to the Minister responsible that he annul a

359. *Id.* ¶ 50.
360. *See id.* ¶ 50-51.
361. *See* Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶¶ 21-23.
362. Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶¶ 49-50, [2002] 2 C.M.L.R. 49 (2002), ¶¶49-50.
363. Because the Belgian case is the only one to date in which the Court permitted the use of golden share measures, it is perhaps the most important because it leaves open the possibility that governments may implement such measures in some instances. Without this decision, the outlook for the future of golden shares would be very dim. Additionally, the Belgian golden share can serve as a model for future golden shares. Provided a government has an acceptable objective, it may avail itself of the protections inherent in golden shares. *See infra* Part III.B.2.
364. Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50 (2002), ¶ 1.
365. *Id.*
366. *Id.*
367. *Id.* ¶ 28.
368. *Id.* ¶ 1.

decision of the board, if he "consider[ed] that the operation in question adversely affect[ed] the national interest in the energy sector."[369]

The structure of these rights, and how they were to be asserted, was of particular consequence to the Court's evaluation. The government officials who were appointed to the board of directors could, within four business days, propose to the appropriate Minister that an action of the board be annulled.[370] The proposal effected an immediate suspension of the action in question.[371] The Minister then had eight business days to take action, and should he fail to annul the decision in that time, the suspension would end, and the action would become effective.[372] However, there was a right of appeal to the Belgian Conseil D'Etat to seek annulment of the Minister's decision.[373]

The Commission, relying on the 1997 Communication, argued that such measures were a restriction of the free movement of capital and the freedom of establishment, and could not co-exist with Community law unless covered by one of the express exceptions.[374] Belgium contended that the measures were justified by reasons of public security and overriding general national interest requirements.[375] Moreover, like both France and Portugal, Belgium noted that the schemes were non-discriminatory.[376]

Following the framework utilized in *France* and *Portugal*, the Court recognized that restrictions on the free movement of capital are clearly contrary to the EC Treaty, and justifiable only in narrowly limited circumstances.[377] The Court then commenced its four part assessment of the system. The objective in question—safeguarding energy supplies and protecting the national energy policy—satisfied the first criterion.[378] Like protection of petroleum supplies,[379] safeguarding energy supplies is a "legitimate public interest."[380] Having determined that the objective was legitimate and might permit some restriction of capital movement, the Court considered whether

369. *Id.* ¶¶ 1, 9.
370. *Id.*
371. *Id.* ¶ 9.
372. *Id.*
373. *Id.* ¶ 29.
374. *Id.* ¶¶ 16-21.
375. *Id.* ¶ 26.
376. *Id.* ¶ 12.
377. *Id.* ¶ 45.
378. *Id.* ¶ 46.
379. *See* Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶¶ 34-35, [1984] 3 C.M.L.R. 544, ¶¶ 34-35 (1984) (recognizing that securing petroleum supplies is of fundamental interest to the public security).
380. Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50, ¶ 46. The Court explicitly acknowledged that though *Campus Oil* was a free movement of goods case, the "same reasoning applies to obstacles to the free movement of capital." *Id.*

the measure was structured to meet the principle of proportionality and legal certainty.[381]

The Court noted three specific elements of the scheme which ensured that it met the requirement of legal certainty. First, it was a system of opposition, not of prior authorization.[382] The investor need not apply for permission; rather, the onus was on the government to object to an action which it believed posed a threat to national security.[383] Second, the government could only object where the action considered by the board related to certain specific assets, such as altering the energy supply networks.[384] Third, the Minister was only permitted to intercede when the government's energy policy objectives were jeopardized by the proposed action.[385] These limitations created the legal certainty necessary to permit a restriction on a fundamental freedom.[386] A final critical element was the availability of judicial review.[387] The Belgian golden shares, therefore, satisfied the principle of proportionality and were a permissible restriction on the free movement of capital and the freedom of establishment.[388]

All four conditions were met, and though the Court did not explicitly apply the four-part test to the facts, it is clear that it considered them all: the scheme was not discriminatory,[389] and it was justified by an overriding need in the general interest,[390] which had previously been identified by the Court in *Campus Oil*;[391] the scheme could effectively achieve the objective,[392] and Belgium had demonstrated that the measure was narrowly tailored to achieve the objective without excessive restriction.[393] The standard, therefore, is not impossible to meet.

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381. *Id.* ¶ 48.
382. *See id.* ¶ 49.
383. *See id.* ¶¶ 47-49.
384. *See id.* ¶ 50.
385. *See id.* ¶ 51.
386. *See id.* ¶ 52.
387. *See id.* ¶ 51. The availability of judicial review of the Minister's decision ensured the necessary predictability needed to create legal certainty. *See id.* ¶ 52.
388. *See id.* ¶¶ 57, 60.
389. *See id.* ¶¶ 9-10 (outlining the laws in question, which were applicable to all persons, regardless of nationality).
390. *See id.* ¶ 46.
391. *See* Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 35, [1984] 3 C.M.L.R. 544 (1984), ¶ 35.
392. *See* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶¶ 45-52, [2002] 2 C.M.L.R. 50, ¶¶ 45-52.
393. *See id.* ¶ 53. ("The Commission has not shown that less restrictive measures could have been taken to attain the objective pursued.").

C. *The 2003 Cases*

In May 2003, the Court handed down two more golden share decisions, one against Spain and the other against the U.K.[394] Not surprisingly, the Court analyzed the laws at issue in these cases using the same formulaic approach as it had in the 2002 cases, focusing on the Article 56 violation and only minimally addressing the Article 43 infringements.[395] Advocate General Ruiz-Jarabo Colomer again rendered a prior opinion,[396] arguing that there were some deficiencies in the Court's analysis of the original golden share cases, particularly that against Belgium as compared to its analysis in the case against France.[397] The Advocate General's opinion determined that in light of those decisions, the case against Spain should be dismissed,[398] while the Court should find the U.K. scheme unacceptably restrictive.[399] As with the original golden share cases, and contrary to the Court's frequent practice of adopting the opinion of the A.G.,[400] the Court did not follow his opinion.

1. *Commission v. Spain*

Spanish Law No. 5/1995 provided the structure for privatization and the retention of certain powers by the State. [401] Specifically, the law

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394. Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, [2003] 2 C.M.L.R. 18 (2003); Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. I-4641, [2003] 2 C.M.L.R. 19 (2003).

395. *See* Case C-98/01, *United Kingdom*, 2003 E.C.R. I-4641, ¶ 52, [2003] 2 C.M.L.R. 19, ¶ 52.

> [I]t is appropriate to point out that in so far as the rules in question entail restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital . . . to which they are inextricably linked. Consequently, since an infringement of Article 56 EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.

Id.; Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 86, [2003] 2 C.M.L.R. 18, ¶ 86 (repeating almost verbatim its consideration of the issue in the case against the U.K.).

396. The Advocate General's analysis was again very well-formulated and seemed to deal with the issues in a more logical manner, and will be discussed in greater detail below. *See infra* Part II.D.

397. Joined Cases C-463/00, Commission v. Spain, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), & Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), Opinion of A.G. Ruiz-Jarabo Colomer, ¶¶ 38-40.

398. *Id.* ¶ 46.

399. *Id.* ¶ 58. A.G. Ruiz-Jarabo Colomer noted that with minor changes, the provisions in place in the U.K. could be brought into line with the Treaty and therefore be legal. Specifically, he noted that reasoned opinions by the government for its use of the golden share powers, and the availability of judicial review, were needed to bring these provisions into conformity. *Id.*

400. *See* Bermann et al., *supra* note 36, at 62 (noting that the Court "often . . . reach[es] the same conclusion, though perhaps on different grounds").

401. Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 9 [2003] 2 C.M.L.R. 18 (2003), ¶ 9.

applied to any undertaking in which the State owned greater than twenty-five percent,[402] and which was involved in "essential services or public services,"[403] activities subject to administrative review due to public interest,[404] and those actions which were exempt from EU laws governing competition.[405] The law set up a system of prior authorization for certain company decisions,[406] as well as for any reduction in the State-owned shares of ten percent or greater, or the acquisition of shares by an investor which "results in a holding of at least ten percent of the share capital."[407] The framework was executed by individual Royal Decrees regarding various undertakings. The sectors involved included petroleum, telecommunications, tobacco, commercial banking, and electricity.[408]

As with the cases against France, Belgium, and Portugal, the Commission argued that any system of prior authorization was per se restrictive of capital movements.[409] Moreover, the Court had addressed this exact form of restriction in *Église de Scientologie*[410] holding that a system "which makes a direct foreign investment subject to prior authorization constitutes a restriction on the movement of capital."[411] The Commission conceded that there may be instances where such restrictions could be applied, but based on clear case law, these are narrowly defined exceptions, and in all circumstances, the principles of legal certainty and proportionality must be met.[412] Furthermore, it is absolutely clear that such restrictions can never be applied for purely economic motives.[413]

It is here that the Commission had its strongest argument. While it

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402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.* Article 90 governs competition. *See* EC Treaty art. 86 (previously art. 90).
406. Case C-463/00, *Spain*, 2003 E.C.R. I-4581, [2003] 2 C.M.L.R. 18, ¶ 9. The company decisions in question related to mergers, de-mergers, disposal of key assets, or alteration of the company purpose.
407. *Id.*
408. *Id.* ¶ 11.
409. *Id.* ¶ 31.
410. Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335.
411. Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 33, [2003] 2 C.M.L.R. 18, ¶ 33 (citing Case C-54/99, *Église de Scientologie*, 2000 E.C.R. I-1335, ¶ 14).
412. *Id.* ¶ 34 (citing Case C-19/92, Kraus v. Land Baden-Wurttemberg, 1993 E.C.R. I-1663; Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, [1996] 1 C.M.L.R. 603 (1995)). These two cases outline the four conditions necessary for the imposition of a restriction of a fundamental freedom. *See* Case C-55/94 *Gebhard*, 1995 E.C.R. I-4165, ¶ 39, [1996] 1 C.M.L.R. 603, ¶ 39; *see also* Case C-12/92, *Kraus*, 1993 E.C.R. I-1663, ¶¶ 37-41.
413. Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 35, [2003] 2 C.M.L.R. 18, ¶ 35; *see also* Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48 (2002), ¶ 52 ("[T]he general financial interests of a Member State cannot constitute adequate justification. It is settled case-law that economic grounds can never serve as justification for obstacles prohibited by the Treaty.").

is true that protecting petroleum was an overriding public interest worthy of restricting the free movement of capital and the freedom of establishment,[414] and it is possible that electricity, like energy[415] and petroleum,[416] could also be considered fundamental to the national interest, the Commission would not accept the protection of a tobacco company as such.[417] Nor would the Commission recognize the commercial banking activity as an overriding interest worthy of an exception to the prohibition on restrictions.[418] Although the measures in place for the petroleum, telecommunications, and electricity companies arguably met the first requirement—that the objective must be valid—the Commission absolutely rejected the system of prior authorization,[419] because it failed both the legal certainty and proportionality tests.[420]

Spain contended that since one of the laws stated that the system of prior approval established by Royal Decree No. 5/1995 was meant to be applied "consistently with the provisions of the Treaty... concerning the right of establishment and the free movement of capital,"[421] it did not violate the Treaty. Spain also adopted A.G. Ruiz-Jarabo Colomer's argument in the original golden share cases: The Treaty expressly states that it "'shall in no way prejudice the rules in Member States governing the system of property ownership,'"[422] and therefore the system did not violate the fundamental freedoms guaranteed by the Treaty.[423]

Notably, Spain argued in the alternative that there was no restriction on the free movement of capital, but conceded that it was possible that the system might affect the freedom of establishment.[424] Nonetheless, Spain contended that "overriding requirements of the general interest"[425] and the necessity of protecting the "continuity in

414. *See* Case C-483/99, Commission v. France., 2002 E.C.R. I-4781, ¶ 47, [2002] 2 C.M.L.R. 49 (2002), ¶ 47; Case 72/83, *Campus Oil Ltd.*, 1984 E.C.R. 2727, ¶ 35, [1984] 3 C.M.L.R. 544, ¶ 35.

415. Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46.

416. *See* 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 35, [1984] 3 C.M.L.R. 544 (1984), ¶ 35.

417. Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 35, [2003] 2 C.M.L.R. 18, ¶ 35.

418. *Id.*

419. *Id.* ¶ 36.

420. *Id.*

421. *Id.* ¶ 40.

422. Joined Cases C-367/98, Commission v. Portugal, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), C-483/99, Commission v. France, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), & C-503/99, Commission v. Belgium, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 40 (citing EC Treaty art. 295).

423. Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 41, [2003] 2 C.M.L.R. 18, ¶ 41.

424. *Id.* ¶ 43.

425. *Id.* ¶ 44.

public services"[426] justified the system.[427] But the Court did not respond to that argument, and instead analyzed the case in exactly the same manner it had in the three original golden share cases. It based the decision on the Spanish law's restriction of the free movement of capital, and left unexplored the examination of the freedom of establishment violation.[428]

The Court agreed with the Commission regarding the golden share rights reserved in the tobacco and banking companies,[429] finding that these industries were not acceptable fields for recognition of an imperative interest justifying a restriction of the free movement of capital.[430] The bank in question was not involved in setting or implementing national policy, nor EU policy, but only in commercial activity.[431] Commercial banking cannot be considered a sector whose protection constitutes an overriding national interest justifying a restriction on capital flows or the right of establishment.[432] At best, it is in the general financial interest of the country, and, as the Court decisively concluded in *Portugal*, such interests do not permit restricting a fundamental freedom.[433] The Court found that the other three undertakings were active in sectors which could, under some circumstances, validate the need to restrict capital flows.[434] However, the Court again agreed with the Commission's argument and found that the measures failed to meet the requirement of legal certainty, as no precise or objective criteria were provided to indicate to the potential investor when such a request for approval would be granted.[435] The scheme allowed for too much discretion "which

426. *Id.*

427. *Id.*

428. *See id.* ¶¶ 85-86:

> In that regard, it is appropriate to point out that in so far as the legislation in issue entails restrictions on freedom of establishment, such restrictions are a direct consequence of the obstacles to the free movement of capital . . . to which they are inextricably linked. Consequently, since an infringement of Art. 56 EC has been established, there is no need for a separate examination of the measures at issue in the light of the Treaty rules concerning freedom of establishment.

Id. ¶ 86.

429. *See id.* ¶ 70.

430. *See id.* (noting that, though the Spanish government argued that "the regime at issue is justified by overriding requirements of the general interest linked to strategic imperatives," Spain failed to establish that the bank had a "public service function.").

431. *See id.*

432. *See id.*

433. *See, e.g.*, Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48 (2002), ¶ 52 ("[T]he general financial interests of a Member State cannot constitute adequate justification.").

434. *See* Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 71, [2003] 2 C.M.L.R. 18, ¶ 71.

435. *See id.* ¶ 74.

represent[ed] a serious threat to the free movement of capital and [might] end by negating it completely."[436]

A comparison of the Spanish system in question and the one implemented by Belgium makes clear that the Spanish scheme was not as narrowly tailored and limited as the Belgian system that the Court upheld.[437] A notable difference was the Spanish system's lack of judicial review of a denial of prior authorization.[438] Had the Spanish scheme met the precision and proportionality requirement, this decision could have been split: The restrictions would not have been acceptable for two industries (tobacco and commercial banking), but would likely have been acceptable restrictions for the other three, as they related to imperative general interests (electricity, petroleum, and telecommunications).

2. *Commission v. United Kingdom*[439]

Another golden share case, this time against the United Kingdom, was also decided on May 13, 2003.[440] The U.K. did not argue that the company involved, the British Airport Authority ("BAA"),[441] was vital to the general interest, public security or public policy.[442] Instead, the U.K. relied on company law.[443]

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436. *See id.* ¶ 76.

437. *See id.* ¶¶ 77-78.

438. *See id.* ¶ 78.

439. Case C-98/01, Commission v. United Kingdom, 2003 E.C.R. I-4641, [2003] 2 C.M.L.R. 19 (2003). The EU does not have a unified Company law, but rather each Member State governs its own corporate law.

> Member States are entitled to engage in economic activities on the same basis as private market operators, within the framework of contracts governed by private law. In the absence of harmonisation of the rules of national company law, Community law cannot impose on a company which issues shares the obligation to place the control of that company on the market, or to attach to its shares the whole range of rights which all actual and potential investors might wish to see attached to them.

Id. ¶ 31.

440. Case C-98/01, *United Kingdom*, 2003 E.C.R. I-4641, [2003] 2 C.M.L.R. 19.

441. *Id.* ¶ 8.

442. It is possible that they may have succeeded had they pursued such a line of argument. Since the specific company in question was the BAA, even disregarding the events of September 11, 2001, a solid argument can be made for the importance of safeguarding a nation's airports as an overriding national interest. In light of the terrorist attacks which were launched from airports, a strong argument for a public security exception also exists. The Court might find that a less restrictive means exists to guard the nation's airports. But, since the Court recognized that restricting foreign property ownership on certain parts of the Italian coast might be a valid objective for a restriction based on national security (if the protective measure was proportionate and not overly burdensome), it is likely that the Court would at least consider a public security argument for airports. However, whether or not protection of the airports would be considered fundamental to the interests of the nation is left open for the future, since the U.K. did not argue that it was. *See id.* ¶ 49.

443. *See id.* ¶ 24.

The Airports Act of 1986 privatized the British airport industry.[444] The Act created a one pound golden share in the BAA, which was established to manage the United Kingdom's airports.[445] The Secretary of Transportation held the share which conferred the right to give written consent regarding the disposal or change in control of certain BAA assets.[446] These rights were included in Article 10 of the BAA's Articles of Association.[447] Article 40 of the Articles of Association limited the percentage of shares that could be owned by any one person.[448] Only "[p]ermitted" persons were allowed to individually hold more than fifteen percent of the voting stock.[449] The U.K. defended the golden share, claiming that share structures are governed by company law, which is a national concern.[450] Moreover, the U.K. argued that since the golden share did not prevent access to the market for the BAA shares, it was not contrary to Community law.[451]

The Commission attacked the golden share on two grounds: first, it limited the potential to acquire voting shares; second, the Commission objected to the system of pre-approval in place for decisions relating to the disposal of assets, loss of control over subsidiaries, and the winding up of the company.[452] Such measures might hinder freedom of establishment and also hamper the free movement of capital.[453] Because the U.K. did not argue that the objective was justifiable for reasons of public security, public policy or an overriding reason of the general interest,[454] and because the golden share seriously limited the right of investors to manage the company without first obtaining approval from the Secretary of Transportation, the Commission argued that the measure was a restriction on the two freedoms.[455] The Commission discounted the company law argument because the rights under discussion did "not arise from the normal operation of that law"[456] and were created only through an act of state.[457]

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444. *See id.* ¶ 8.
445. *See id.*
446. *See id.* ¶ 10. Specifically, the Secretary of Transportation had to be conferred with prior to (1) the BAA ceasing to hold controlling shares in any of the designated airports; (2) the dissolution of the BAA or of any of its subsidiaries which own a designated airport, unless in so doing the designated airport is still owned by the BAA or another subsidiary; and (3) the disposal of any designated airport. *See id.*
447. *See id.*
448. *See id.* ¶ 11.
449. *See id.*
450. *See id.* ¶ 16.
451. *See id.*
452. *See id.* ¶ 19.
453. *See id.* ¶ 20.
454. *See id.* ¶ 22.
455. *See id.* ¶ 23.
456. *See id.* ¶ 24.

Again refusing to investigate the possible Article 43 infringements,[458] the Court built upon previous free movement of capital case law and evaluated the compatibility of the U.K. golden share with Treaty rights. Finding that measures which limit the "scope for participating effectively in management"[459] restrict the free movement of capital, the Court established that the cap on the amount of voting stock an investor may own was a violation of Article 56.[460] Deterring investment is an indirect restriction to market access.[461] Therefore it could not be tolerated, unless justified by a Treaty exception or an imperative reason of national interest.[462] None being offered, the Court confined itself to the questions presented, and agreed with the Commission that the U.K. rule did not fall within the normal operation of company law, and therefore was not excluded from compliance with Article 56.[463]

D. *Advocate General Ruiz-Jarabo Colomer's Opinion*

Advocate General Ruiz-Jarabo Colomer rendered opinions in both the 2002 golden share cases and the 2003 golden share cases.[464] In

457. *See id.* Since Parliament had to act to insert this special share in the Articles of Association, the Commission refused to recognize this as a normal operation of the U.K. Company law. *Id.*

458. *See id.* ¶¶ 51-52. Again the Court held that any infringement of Article 43 is a "direct consequence" of the restriction of the free movement of capital, and need not be examined independently. *Id.*

459. *See id.* ¶ 44; *see also* Case C-221/89, The Queen v. Sec'y of State for Transp., *ex parte* Factortame Ltd., 1991 E.C.R. I-3905, ¶¶ 20-23 (coming to the same conclusion vis-à-vis the right of establishment by finding that a British condition that the owner of a ship be British in order to register it infringes upon the right of establishment since "where the vessel constitutes an instrument for pursuing an economic activity which involves a fixed establishment in the Member State concerned, the registration of that vessel cannot be disassociated from the exercise of the freedom of establishment.").

460. *See* Case C-98/01, *United Kingdom*, 2003 E.C.R. I-4641, ¶ 44, [2003] 2 C.M.L.R. 19, ¶ 44.

461. *See id.* ¶ 47. The Court has found such deterrence effectively deprives persons of their Treaty rights. *See* Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 37, [1996] 1 C.M.L.R. 603 (1995), ¶ 37 ("[N]ational measures liable to hinder or *make less attractive* the exercise of fundamental freedoms guaranteed by the Treaty must fulfil four conditions." (emphasis added)); *cf.* Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶ 26, [2000] 3 C.M.L.R. 1143 (1999), ¶ 26 (holding that a rule which might dissuade a homebuyer from denominating his mortgage in another Member State's currency deprives them of the right to free movement of capital).

462. *E.g.*, Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶ 45, [2002] 2 C.M.L.R. 49 (2002), ¶ 45.

463. *See* Case C-98/01, *United Kingdom*, 2003 E.C.R. I-4641, ¶¶ 48-49, [2003] 2 C.M.L.R. 19, ¶¶ 48-49.

464. Joined Cases C-463/00, Commission v. Spain, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), & C-98/01, Commission v. United Kingdom, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), Opinion of A.G. Ruiz-Jarabo Colomer; Joined Cases C-367/98, Commission v. Portugal, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002); C-483/99, Commission v. France, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002); & C-

both instances, the Court declined to adopt his opinion.[465] In the 2002 cases, the Advocate General opined that, with one exception,[466] the various powers reserved by the states in the form of the golden shares were completely consistent with Treaty obligations.[467] Article 295 states, simply and unequivocally: "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership."[468] Determining that the Treaty intended that property ownership must "extend to any measure which, through intervention in the public sector, understood in the economic sense, allows the State to contribute to the organisation of the nation's financial activity,"[469] A.G. Ruiz-Jarabo Colomer argued that any interpretation of property law so narrowly limited to apply to purely private or civil law was "absurd."[470] Furthermore, Article 295 is placed in part six of the Treaty—General and Final Provisions—thus he reasoned that Article 295 must apply to all preceding Treaty provisions.[471] Furthermore, he utilized an historical approach to interpreting the import of the article, and noted that Article 295 traces its authority to the initial agreements.[472] Based on the wording of the first version of this Article, "[t]his Treaty shall in no way prejudice the system of ownership of means of production which exists within the Community,"[473] it would be logical to conclude that a state may have a property right in "exercis[ing] decisive influence on the definition and implementation of all or some of its economic objectives."[474]

503/99, Commission v. Belgium, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48 (2002), Opinion of A.G. Ruiz-Jarabo Colomer

465. *See supra* notes 289-92, 396-400 and accompanying text.

466. The exception was the discriminatory law in place in Portugal, which is discussed *supra* Part II.B.1. *See* Joined Cases C-367/98, *Portugal*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48; & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶¶ 29-30.

467. Joined Cases C-367/98, *Portugal*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 92.

468. EC Treaty art. 295; *see also* Joined Cases C-367/98, *Portugal*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 40.

469. Joined Cases C-367/98, *Portugal*, [2002] E.C.R. ___, [2002] 2 C.M.L.R. 48, C-483/99, *France*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, & C-503/99, *Belgium*, 2002 E.C.R. ___, [2002] 2 C.M.L.R. 48, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 56.

470. *See id.* ¶ 63.

471. *Id.* ¶ 43.

472. *Id.* ¶ 45 ("Article 295 EC is in the unique position of deriving its authority directly from the Schuman Declaration of 9 May 1950, on which it has been based, which reinforces its specific nature and symbolic importance.").

473. *Id.* ¶ 51 (referring to the wording of the original draft of 5 December 1956).

474. *Id.* ¶ 54. However, the reasoning utilized by A.G. Ruiz-Jarabo Colomer fails to fully explain why a state would not simply retain a majority holding in those companies which it believes to be critical to the interests of the nation, and thereby retain the ability to direct the company. For a discussion of some perceived

A.G. Ruiz-Jarabo Colomer's reasoning in the 2003 cases is arguably the most persuasive of all the analysis available on the compatibility of golden shares with Community law. Additionally, A.G. Ruiz-Jarabo Colomer exposed some deficiencies in the Court's analysis of the 2002 golden share cases. First, the A.G. asserted that the freedom of establishment represents a more suitable framework than that of the free movement of capital for an analysis of restrictions arising from state-held golden shares.[475] The states were attempting to influence control of privatized companies, not the movement of capital into the nation.[476] As such, the measures only affect capital movements indirectly.[477] Like *Luisi & Carbone*, where capital movements were only a necessary by-product of the free movement of services,[478] here, the movement of capital was incidental to the exercise of the right of establishment. Because the freedom of establishment is directly infringed, and the free movement of capital only incidentally, the appropriate inquiry was how the various golden share mechanisms infringed freedom of establishment.[479]

Furthermore, A.G. Ruiz-Jarabo Colomer contended that there were some deficiencies in the Court's 2002 golden share decisions.[480] Leaving aside the judgment against Portugal, which was clear, he then compared the French regime with that of Belgium.[481] In *Belgium*,[482] the Court made much of the legal certainty of the system in place: the governmental representative on the board had only four days in which

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weaknesses of A.G. Ruiz-Jarabo Colomer's opinion, see Kronenberger, *supra* note 13, at 125-27.

475. *See* Joined Cases C-463/00, Commission v. Spain, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), & C-98/01, Commission v. United Kingdom, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18 (2003), Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 36.

476. *See id.* ¶ 36; *see also* Case C-463/00, *Spain*, 2003 E.C.R. I-4581, ¶ 39, [2003] 2 C.M.L.R. 18, ¶ 39 (noting that government approval allows the government to ensure that "the specific responsibilities" of the privatized undertakings are met); Case C-483/99, *France*, 2002 E.C.R. I-4781, ¶ 28, [2002] 2 C.M.L.R. 49, ¶ 28 (noting that ensuring that the decision-making body remain in France is essential to the protection of the energy supplies); Case C-367/98, *Portugal*, 2002 E.C.R. I-4731, ¶¶ 31-32, [2002] 2 C.M.L.R. 48, ¶¶ 31-32 (arguing that the Portuguese government must have the requisite level of control to ensure that the re-privatization goals are not frustrated); Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 28, [2002] 2 C.M.L.R. 50, ¶ 28 (noting that the government needs the means to protect the energy policy from being negatively affected by company decisions).

477. *See* Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 36.

478. *See* Case C-286/82, Luisi & Carbone v. Ministero del Tesoro, 1984 E.C.R. 377, ¶ 22, [1985] 3 C.M.L.R. 52 (1984), ¶ 22.

479. *See* Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 36.

480. *See id.* ¶¶ 36-37.

481. *Id.* ¶¶ 38-40.

482. Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50 (2002).

to object, and the Minister then had twenty-one days to overturn the board's decision.[483] A.G. Ruiz-Jarabo Colomer noted, however, that the French measure was also subject to strict time limits—the French minister had one month in which to deny authorization.[484] That was only minimally longer than the time period which the Court allowed in *Belgium*.[485]

Moreover, the A.G. noted the lack of specificity in the Belgian system; the government representative could object to any proposed action which he deemed contrary to national energy policy.[486] The Court found this to be an "objective criteria"[487] sufficiently clear to guarantee legal certainty. However, the A.G. did not believe this to be so much more clear or precise than the French system of opposition to any transfer or disposal of an asset identified in an annex to the decree in question.[488] The French law also indicated that authorization would be denied in order to protect the national interest,[489] but the Court was not satisfied that this offered the same level of protection as the Belgian law, which specifically stated that the Minister was concerned with the national energy policy.[490] Apparently, this incremental amount of added specificity was enough. Though the Court methodically evaluated each of the golden share cases in the same manner, it remains unclear what is actually required to meet the principle of legal certainty; indeed, it is much easier to determine what fails to meet the test.

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483. *See* Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 39; *see also* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 49, [2002] 2 C.M.L.R. 50, ¶ 49.

484. *See id.* ¶ 39. However, the French Minister was able to extend this time limit by a further fifteen days. *See id.*

485. *See* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 22, [2002] 2 C.M.L.R. 50, ¶ 29. In *Belgium*, the Court found twenty-one days to be an acceptable time frame for the Minister to act, whereas in the French regulation, the government had one month. *Id.* ¶ 49.

486. *See* Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 38; *see also* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 9, [2002] 2 C.M.L.R. 50, ¶ 9.

487. Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 52, [2002] 2 C.M.L.R. 50, ¶ 52.

488. *See* Joined Cases C-463/00, *Spain*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, & C-98/01, *United Kingdom*, 2003 E.C.R. ___, [2003] 2 C.M.L.R. 18, Opinion of A.G. Ruiz-Jarabo Colomer, ¶ 38.

489. *See* Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶ 50, [2002] 2 C.M.L.R. 49, ¶ 50 (2002).

490. Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 9, [2003] 2 C.M.L.R. 50, ¶ 9. However, Fleisher finds that the two modes of control are in fact different in a very important manner. According to Fleisher, the Belgian system restricted the management of the company, whereas the French system restricted the access to the company. *See* Fleisher, *supra* note 19, at 495. Such a distinction would seem to reconcile the two decisions, but this distinction is not readily apparent in the decisions, and the wording of the two systems is not so very different.

III. WHAT LIES AHEAD

This part considers the future import of the golden share rulings. Part III.A. identifies some recently commenced actions. Part III.B. discusses the reaction by Member States, as well as both acceding and applicant states, to the judgments. Finally, Part III.C. looks at the broader role of the rulings within the context of the EU as an institution.

The first golden share cases provide the framework for scrutinizing future use and structure of golden share devices, but the fact-intensive inquiry necessary to determine which derogations are compatible with the Treaty[491] ensures that these six cases are just a starting point. Specifically, *Portugal* mandates that something more than an economic or commercial objective is needed to justify restricting capital flows,[492] and *France* and *Belgium* are pivotal for defining the scope of the proportionality requirement.[493] The Belgian case ensures that some golden shares comply with Community law,[494] which is precisely why the ECJ will hear more golden share cases. *Spain* and *United Kingdom* illustrate the Court's application of the framework.[495]

Based on the Court's decisions and the arguments of the Commission,[496] one would expect that the existence of these golden shares has had a great impact on investment in the EU. But the Organization for Economic Co-operation and Development (the "OECD") concluded that barriers to inward foreign investment are lower in EU Member States than in any other industrialized nation.[497] The purpose of Article 56 and the free movement of capital is to ensure that cross-border investment and capital flows are not inhibited,[498] and it would seem that the existence of golden shares has

491. *See supra* Part II.

492. *See* Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48 (2002), ¶ 52; Case C-54/99, Association Église de Scientologie de Paris v. Prime Minister, 2000 E.C.R. I-1335, ¶ 17.

493. The French law was not as detailed as the Belgian Decrees, and failed to provide the "objective and stable criteria" ultimately required for a golden share right to be compatible with Community law. *See* Communication, *supra* note 20, ¶ 9. *Belgium* threw a lifeline to the battered golden share, though, and ensured that these special rights did not yet face extinction. *See* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 55, [2002] 2 C.M.L.R. 50, ¶ 55 (permitting the use of the Belgian golden share because it met the four-prong test).

494. *See supra* notes 377-93 and accompanying text.

495. *See supra* Part II.C.

496. *See supra* Part II.

497. In a worldwide review of investment movement, the OECD concluded that the EU Member States have "the lowest barriers in the industrialised world to inward foreign direct investment." Guy de Jonquieres, *Europe Leads Way in Lack of Barriers to Foreign Investment*, Fin. Times, May 23, 2003, at 9. Of course, the results of the OECD review are not adjusted to reflect the existence of restrictive measures, and it is very likely that the results tell more about the existence and effectiveness of restrictions elsewhere.

498. *See supra* note 108 and accompanying text (discussing the exceptions to the

not completely dissuaded investment movement. But Article 56 is unequivocal,[499] and the Commission will certainly not give up the fight to free the EU from all unnecessary restrictions.

A. *Pending Action*

The Commission is seriously contemplating taking action against Germany for what it views as excessive state control over Volkswagen.[500] The German state of Lower Saxony retains an unusually high degree of control over Volkswagen.[501] Germany has argued that the Volkswagen law (the "VW law") is simply the German version of a golden share, and thus should not be attacked as incompatible with Treaty obligations.[502] Now that the Court has spoken so decisively on golden shares,[503] this argument is less likely to prevail.

On March 19, 2003, the Commission sent Germany notice that, in its view, this law was contrary to the free movement of capital and the

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free movement of capital which are detailed in Article 58).

499. *See supra* note 64 and accompanying text.

500. *See, e.g.*, Aude Genet, *EU Launches Action Against "Volkswagen Law,"* EU Bus., Mar. 19, 2003, *at* http://www.eubusiness.com/imported/2003/03/105947/view.

501. A strict limitation on voting rights prevents any shareholder from exercising more than twenty percent of the voting stock, regardless of how much stock they actually own. *See* Breffni O'Rourke, *Big Business in Europe—Global Outlook Limited for Vivendi, Volkswagen*, EU Bus., July 10, 2002, *at* http://www.eubusiness.com/imported/2002/07/85779/view; *EU Launches Action Against German Law Protecting VW Against Takeovers*, EU Bus., Mar. 19, 2003, *at* http://www.eubusiness.com/imported/2003/03/105935/view. This guarantees the state of Lower Saxony at least operational control of the company, despite state ownership of only eighteen and a half percent of the company. *EU Delays Decision on Germany's Volkswagen Law by Two Weeks*, EU Bus., Mar. 5, 2003, *at* http://www.eubusiness.com/imported/2003/03/104811/view. Additionally, this control is further strengthened by the State's ability to name approximately half of the shareholder representatives to the supervisory board. *EU Launches Action Against German Law Protecting VW Against Takeovers*, EU Bus., Mar. 19, 2003, *at* http://www.eubusiness.com/imported/2003/03/105935/view; *see also* Genet, *supra* note 500. Furthermore, for certain decisions, a majority vote of greater than eighty percent is required. *See* Press Release, European Commission, Free Movement of Capital: Commission Asks Germany to Justify Its Volkswagen Law (Mar. 19, 2003), *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh [hereinafter March Press Release]. Though Volkswagen is publicly traded on exchanges throughout Europe, New York, and Japan, *see* http://www2.volkswagen-ir.de/index.php@id=392&type=2.html (last visited Feb. 20, 2004), and is widely held stock, the voting cap is a potential hindrance of capital movements, and as the Court specifically stated in *Trummer & Mayer*, direct evidence of a restriction is not necessary for a measure to infringe upon a fundamental freedom. Case C-222/97, Trummer & Mayer, 1999 E.C.R. I-1661, ¶¶ 26-28, [2000] 3 C.M.L.R. 1143 (1999), ¶¶ 26-28 (holding that measures which may dissuade investment, even if they do not prohibit or directly restrict it, violate Article 56 EC).

502. *See Equalising Shares—Governments Must Let Go of Privatised Companies*, Fin. Times, May 14, 2003, at 22.

503. *See supra* Part II.

freedom of establishment.[504] Germany continues to aggressively defend the VW law.[505] If the case goes to the ECJ, it is likely that the German law will be put to the same four-part test used in the golden share cases,[506] even though the VW law is not structured as a traditional golden share.[507] Like the Spanish protection of the banking and tobacco industries, it is unlikely that protecting a car manufacturer would be considered an imperative interest in the national interest, or acceptable for public policy or public security reasons.[508] Like *Portugal* and *Spain*, Germany's objective does not satisfy the Treaty requirements and does not merit derogation.[509] In the unlikely event that Germany is able to convince the Court that there is an acceptable imperative need in the general interest for the protection of Volkswagen, the measure would still be required to fulfill the principles of legal certainty and proportionality.[510]

The Commission has taken the first steps to bring proceedings against the Netherlands, Italy, Luxemburg, and Denmark for use of golden shares.[511] The Netherlands holds a golden share in KPN, a formerly state-owned telecommunications giant.[512] Despite the Commission's stance, the Netherlands has indicated that it has no

504. *Id.* Germany was given eight weeks in which to justify these provisions, and if it failed to do so, the Commission could issue a "reasoned opinion" and move on toward litigation. *See* James Durance, *Germany—East German Strike Pain Increases, Forcing Automakers to Revise Production Schedules*, WMRC Daily Analysis, June 23, 2003, *available at* 2003 WL 56932252. It appears likely that such an opinion will be sent, since Germany staunchly defended this law as consistent with EU law throughout the two month period granted to it to justify the law. *See id.*; Haig Simonian & Francesca Guerrera, *Germany Resists EU Attempt to Outlaw VW Takeover Protection*, Fin. Times, June 21, 2003, at 9. Since the law effectively does the same thing as a golden share, it clearly restricts the movement of capital.

505. Germany contends that the law is justified. *See* Renee Cordes, *VW Back in EU Headlights*, Daily Deal, Jan. 16, 2004, *available at* 2004 WL 64605306. Furthermore, the company is currently not doing very well financially, and there is some fear of a takeover which would could result in many job cuts. *See id.*

506. *See supra* Part I.B.

507. *See* Cordes, *supra* note 505.

508. *See supra* notes 429-32 and accompanying text.

509. It is likely that the Court would view this as protection of an economic interest, and as such, impermissible. *See supra* note 330 and accompanying text; *see also* Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 35, [2003] 2 C.M.L.R. 18 (2003), ¶ 35; Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, ¶ 52, [2002] 2 C.M.L.R. 48 (2002), ¶ 52.

510. *See supra* Part I.B.2-3.

511. *See* Vincent Brophy, *End of the Golden Age*, Legal Wk., June 19, 2003, *available at* 2003 WL 8422786; Julian Ellison & Duncan Reed, *Getting Tough on Golden Shares*, Fin. Times (FT.Com), June 6, 2003, *available at* 2003 WL 57800177; *Ruling Paves the Way For Pan-European Investment*, Irish Times, May 17, 2003, at 18, *available at* 2003 WL 20053490; *see also* Paul Meller, *EU Sues Over Dutch 'Golden Shares,'* Int'l Herald Trib., Dec. 18, 2003, at 12, *available at* 2003 WL 64834347.

512. *See* Press Release, Commission of the European Union, Free Movement Of Capital: Commission Takes the Netherlands to Court of Justice on Special Powers in KPN and TNT (Dec. 17, 2003), *at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh.

plans to relinquish its golden share in KPN.[513] Italy is resisting pressure by the Commission to relinquish a golden share in Telecom Italia.[514] In both cases, the ECJ could find that at least the first prong of the test has been met.[515]

The Commission has also issued warnings to Italy and Spain regarding laws in both nations which are designed to protect their energy companies.[516] Both regimes were put in place to protect against acquisition by Électricité de France.[517]

All of this activity ensures that there will be more golden share cases in the future. The Court in *Spain* stated that protection of the telecom industry might, under the right circumstances, fall under the public security exception.[518] The Court also held in *Belgium* that the energy sector can justify a restriction of the free movement of capital and the freedom of establishment.[519] Therefore, any future inquiry by the Court will focus on whether the laws imposed satisfy the principles of proportionality and legal certainty—at least in regard to Telecom Italia, Eni SPA, Enel, KPN and Endesa.

B. *Reaction to the Decisions*

1. Member States

Reaction by the Member States to the rulings in the golden share cases has been mixed.[520] Popular opinion does not completely support

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513. *See* Meller, *supra* note 511.

514. Fred Kapner, *Italia Chief Still in Control*, Fin. Times (London), July 20, 2003, *available at* 2003 WL 57801986. The golden share permits the state to veto the acquisition of more than three percent of the company by an individual investor. *Id.*

515. Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 71, [2003] 2 C.M.L.R. 18 (2003), ¶ 71.

> As regards the three other undertakings concerned, which are active in the petroleum, *telecommunications* and electricity sectors, it is undeniable that the objective of safeguarding supplies of such products or the provision of such services within the Member State concerned in the event of a crisis may constitute a public-security reason and therefore may justify an obstacle to the free movement of capital

Id. (emphasis added).

516. *See* Orange, *supra* note 26; *see also supra* note 26 and accompanying text.

517. *See* Orange, *supra* note 26.

518. *See supra* note 515.

519. *See* Case 503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50, ¶ 46 (2002).

520. France repealed its golden share in Elf-Aquitaine on October 3, 2002. *See* Press Release, Commission of the European Union, Free Movement Of Capital: Commission Calls On Portugal to Apply a Ruling of the Court Of Justice; Proceedings Against France Are Closed (May 15, 2003), *available at* http://www.europa.eu.int/rapid/start/cgi/guesten.ksh [hereinafter May Press Release]. The French repealed the golden share through Decree No. 2002-1231. The Commission officially declared the case closed on May 15, 2003. *Id.* A year after the Court ruled in the 2002 cases, the case against France was officially closed, and the

the decisions,[521] and both Portugal and Spain have expressed reluctance to comply with the rulings.[522] But the Commission is not

Commission declared France compliant. *See id.* In May 2003, the Commission stated that Portugal had failed to provide evidence that they have eliminated the restrictions. *Id.* The U.K. quickly indicated that it would comply with the Court's ruling. *See* Kevin Done, *Government Loses BAA Golden Share*, Fin. Times, Sept. 17, 2003, at 26. Done also noted that the BAA is going beyond this and also plans to remove the condition in its articles of association which limits voting rights of individual investors to fifteen percent. *Id.*; *see also* Sean O'Grady, *So Called Golden Shares Are the Base Metal of Nationalism*, The Independent, May 17, 2003, at 7, *available at* 2003 WL 20379256. However, the U.K. still holds golden shares in a number of companies, including BAE Systems, British Energy and Rolls-Royce, among others. *BAA 'Golden Share' Ruled Illegal*, BBC News, May 13, 2003, *at* http://news.bbc.co.uk/1/hi/business/3022809.stm; *see also* Ellison & Reed, *supra* note 511 (noting that the government in the U.K. still has golden shares in more than twenty companies, and it is unlikely the Commission will stop with the BAA golden share). Spain, on the other hand, has stated that it will not give up its golden shares in Indra (defense and electronics), Telefonica (telecommunications), Repsol (oil), or Endesa (power). Spain fears that "shortcomings of EU legislation in this area [will] return the Spanish economy to a situation in which companies controlled by the state have stakes in deregulated industries." *Spain Remains Defiant over 'Golden Share' (La Accion De Oro Solo Vetara A Empresas De Capital Publico)*, Expansion, July 8, 2003, *available at* LEXIS, News Library, Expansion File. However, there is some likelihood that Spain will try to revise its golden share to fit into the Belgian model. *See Commission Sends Assent Against "Anti-EDF" Laws in Spain and Italy*, Agence Europe, July 10, 2003, *available at* 2003 WL 58351621.

521. Some fear that the European Union is not really working to the best interests of all the member states. *See* Graham Booth, Letter to the Editor, *EU Meddling Threatens Our Airports*, W. Morning News, Sept. 30, 2003, at 4, *available at* 2003 WL 64568724. Mr. Booth expressed frustration with the appearance that the EU manipulates the rules to the benefit of certain key cities, specifically Paris and Frankfurt. *Id.* Mr. Booth's anger has some basis, at least on a superficial level, given the recent concern over France and Germany's blatant disregard for the requirements of the Stability and Growth Pact, and their subsequent ability to persuade the EU Finance Ministers not to recommend they be forced to pay fines that would likely be imposed on smaller EU nations which do not constitute such a large percentage of the overall EU economy. *See* Ernst Welteke, *The Pact's Principles Must Always Be Protected*, Fin. Times, Dec. 4, 2003, at 15 (discussing the damage to the "European idea" caused by not penalizing Germany and France). Interestingly, the Commission is considering taking legal action against the European Council for deciding not to impose sanctions. *See* Enda O'Doherty, *View from the European Press*, Irish Times, Jan. 19, 2004, at 8, *available at* 2004 WL 61029250; Chris Flood, *Preview: UK Interest Rate Rise May Be Delayed*, Fin. Times (FT.Com), Jan. 18, 2004, *available at* 2004 WL 56787003 (noting that the agenda for the EU finance ministers' meeting on January 18, 2003 included the Commission's threat to bring action against the Council). The decision not to impose sanctions effectively seriously undermined the Stability and Growth Pact. *See* Wolfgang Munchau, *Flexible Rules for Europe Strictly Enforced*, Fin. Times, Jan. 19, 2004, at 13. The debate over this will undoubtedly reverberate through EU politics. *See* George Parker & Bertrand Benoit, *Brussels Insists on Mounting Stability Pact Legal Challenge*, Fin. Times, Jan. 14, 2004, at 2 ("The spectacle of the Commission and the EU member states fighting in court over a central plank of economic policy is a symptom of growing mistrust and ill feeling at the heart of Europe."). There is some concern that golden share rulings demonstrate only that the EU interferes in areas of national interest, where the EU does not belong, and fear that "[t]he EU shifts power from democratic governments to elites controlled by big corporations, seeking to create monopolies." Bob Glanville, *Activists Condemn EU Airport Ruling: Decision Prepares Ground For Hostile*

likely to stand idly by and permit individual states to disregard the decision of the Court.[523] Should Portugal and Spain continue to ignore the decisions, the Commission can take further action and has already indicated that it plans to initiate a proceeding against Portugal for its failure to comply.[524] Pursuant to Article 228, the Commission may return to the Court and request that a penalty (lump sum or fine) be imposed upon the delinquent Member State.[525] Of course, the suggestions of the Commission cannot bind the Court,[526] but the Court has already demonstrated sympathy with the Commission's arguments regarding the restriction of capital movements imposed by golden shares.[527]

2. Applicant and Acceding States

Privatization is not an historical artifact.[528] It is still ongoing in much of Central and Eastern Europe, and in other parts of the world, such as Africa.[529] Since many of the Central and Eastern European

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Takeover, Morning Star, May 14, 2003, at 5, *available at* LEXIS, News Library, Morning Star File (stating that the BAA ruling is "just another example of the European Union meddling in politics and economics in Britain" (quoting Ian Davidson, MP, chairman of Labour Against the Euro)). Such sentiments may have no influence at all, as shown by the immediate compliance with the ECJ's ruling by the U.K., even though voices of dissent have been heard. However, such sentiments may strengthen the resolve of governments still battling to maintain their influence over certain companies. And, since at least two nations have yet to comply, it is apparent that there remains some dissatisfaction with the decisions at higher levels of government. The fear that the EU is overshadowing national identity may fuel support for the use of golden shares. On the other hand, some see their use as "economic nationalism," which is contrary to the spirit of the EU, and not necessarily the best business decision for some of these companies. *See* O'Grady, *supra* note 520.

522. Portugal has yet to comply with the decision. *See* May Press Release, *supra* note 520. Spain also seems intent on ignoring the Court's ruling. *See Follow My Leader*, The Bus., Jan. 18, 2004, *available at* 2004 WL 60734799.

> T[he] ... government has been stung into action by France and Germany's methods of dealing with troublesome European Union rules by ignoring them. After Paris and Berlin reacted to breaches of the stability and growth pact by suspending the rules that would have imposed fines on them, Madrid has decided to ignore the rules as they relate to golden shares.

Id.

523. *See* May Press Release, *supra* note 520 (publicizing the Commission's decision to instigate action against Portugal for failure to comply).

524. *See id.*

525. EC Treaty art. 228(2).

526. *Id.*; *see also* Case C-387/97, Commission v. Greece, 2000 E.C.R. I-5047, ¶ 89 ("It should be stressed that these suggestions of the Commission cannot bind the Court[,] ... [h]owever, the suggestions are a useful point of reference.").

527. With only one exception, the Court has been persuaded by the Commission's arguments in the golden share cases. Only in the case of *Belgium* did the Court find for the Member State rather than the Commission. *See* Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50 (2002).

528. Privatization is still ongoing in much of Central and Eastern Europe, as well as in other parts of the world. *See infra* notes 529-30 and accompanying text.

529. For example, Ghana holds a golden share in Ashanti, a gold company. The

nations are hoping to join the EU—some as early as May 2004—these rulings have significant consequences for these nations and have not gone unnoticed.[530] Many are heeding the warning.

For example, Hungary is among the ten nations joining the EU in 2004.[531] Hungary owns a golden share in MOL, an oil and gas company.[532] The privatization agency, APV, has indicated that the government's shares will be sold off over the next few years,[533] but it would like to hold on to its golden share as long as possible.[534] Hungary could still create a golden share in MOL, emulating the scheme implemented by Belgium, which could withstand the Court's scrutiny. Since the protection of the specific industries involved has already been deemed an acceptable objective,[535] the government need only ensure that whatever law it fashions comports with the strict requirements outlined in *Belgium*.[536]

Romania, which is not acceding to the Union in 2004, but has applicant state status,[537] has initiated proceedings to privatize SNP

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golden share allows the Ghanian government to veto any company decision which would alter the gold operation. *See, e.g.*, Julie Bain, *AngloGold Seeks Ashanti Shield*, Bus. Day (South Africa), Oct. 31, 2003, at 16, *available at* 2003 WL 66919947.

530. Both the Czech Republic and Poland are busy privatizing steel holdings in order to comply with EU mandates on the limitation of state aid and new production quotas, so it is obvious that the acceding states are paying close attention to the mandates of EU law. *See Polish and Czech Heavy Industries Undergo Painful Transition*, EU Bus., Oct. 26, 2003, *at* http://www.eubusiness.com/afp/031026025158.f65gm6ej. There is no indication that either state is attempting to maintain golden shares in these companies, which is just as well, since it is highly unlikely that such restrictions could pass the justification prong of the test.

531. *See, e.g.*, http://www.europa.eu.int/abc/european_countries/new_eu_members/hungary/index_en.htm (last visited Feb. 20, 2004).

532. *See* Eral Yilmaz, Hungary—Tender for Advisor to MOL Privatisation Attracts Five Bidders, WMRC Daily, Aug. 14, 2003, *available at* 2003 WL 60322832.

533. *See id.*

534. *See id.* Despite the Court's determination that protectionist measures in the energy and petroleum sectors can indeed be accepted under the right circumstances, some still have the impression that such measures might not be permitted. *See* Andrew Neff, *Hungary Picks Citigroup to Steer State Sale of MOL Stake*, WMRC Daily, Sept. 1, 2003, *available at* 2003 WL 60324264 ("[R]ecent rulings by the European Court of Justice indicate that EU member state governments will not be allowed to keep golden shares in 'strategic' formerly state-owned companies that have largely passed into private hands.").

535. *See* Case C-483/99, Commission v. France, 2002 E.C.R. I-4781, ¶ 47, [2002] 2 C.M.L.R. 49 (2002), ¶ 47 (citing to Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶¶ 34-35, [1984] 3 C.M.L.R. 544 (1984), ¶¶ 34-35, which held that protection of petroleum supplies may permit restrictions on Treaty rights); Case C-503/99, Commission v. Belgium, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50 (2002), ¶ 46 (permitting an indirect restriction on Article 56 and Article 43 rights for protection of the nations' energy supplies).

536. Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, [2002] 2 C.M.L.R. 50.

537. *See* http://www.europa.eu.int/abc/european_countries/candidate_countries/romania/index_en.htm (last visited Feb. 20, 2004).

Petrom, which also operates in the oil and gas sectors,[538] and has indicated that the state would like to reserve a golden share in the privatized company.[539] Given the framing of the Court's decisions in the golden share cases, Romania would also likely be able to craft a golden share which would be acceptable to the ECJ. Because the industries in question, oil and gas, meet the threshold requirement of an acceptable objective,[540] Romania need only ensure that the law is crafted in such a way as to be minimally restrictive and that it meet the principles of legal certainty and proportionality.[541]

Another applicant state which is proceeding with privatization is Bulgaria.[542] Bulgaria is privatizing the telecom company BTC.[543] Bulgaria has reached an agreement with the British based, American-owned, Advent for the sale of the company, but Bulgaria will retain a golden share in the company.[544] As with Hungary and Romania, the company operates in an industry which might justify some state control,[545] and therefore, so long as Bulgaria formulates the golden share in a narrowly tailored, proportionate and precise way, it need not conflict with EU law.

It is likely that nations undergoing privatization are now in a better position to reserve golden shares and implement schemes to protect industries of vital public interest or public security interest which will hold up to the ECJ's scrutiny. Using the Court's decisions and tests as guidance, nations can evaluate which industries might meet the threshold acceptable objective test—such as MOL in Hungary and

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538. *See* Valerie Mason, *Romania Launches Petrom Privatizations*, WMRC Daily, Aug. 27, 2003, *available at* 2003 WL 60323703; *see also* Andrew Neff, *Buyers Ready, Seller Not: Romanian Government Postpones Sale of Petrom Again*, WMRC Daily, July 16, 2003, *available at* 2003 WL 58437985.

539. *See* Neff, *supra* note 538.

540. *See* Case C-483/99, *France*, 2002 E.C.R. I-4781, ¶ 47, [2002] 2 C.M.L.R. 49, ¶ 47 (citing to Case 72/83, Campus Oil Ltd. v. Minister for Indus. & Energy, 1984 E.C.R. 2727, ¶ 35, [1984] 3 C.M.L.R. 544 (1984), ¶ 35, wherein the Court found protection of petroleum supplies to be of fundamental importance to the national security); *cf.* Case C-503/99, *Belgium*, 2002 E.C.R. I-4809, ¶ 46, [2002] 2 C.M.L.R. 50, ¶ 46 (holding that safeguarding of energy supplies can meet the criteria for restricting capital flows).

541. *See generally* Case C-55/94, Gebhard v. Consiglio dell'Ordine degli Avvocati e Procuratori di Milano, 1995 E.C.R. I-4165, ¶ 39, [1996] 1 C.M.L.R. 603 (1995), ¶ 39 (detailing the four required conditions for a restrictive law to be acceptable).

542. *See* http://www.europa.eu.int/abc/european_countries/candidate_countries/bulgaria/index_en.htm (last visited Feb. 20, 2004).

543. *See* Boris Maleshkov, *Chronology—No Quick End Seen to Stalled Bulgarian Telecom Privatisation Saga*, Bulgarian News Dig., Oct. 2, 2003, *available at* 2003 WL 61953039.

544. *See id.*; *see also* ELANA, Bulgarian Telecommunications Company Report 8 (Sept. 27, 2002) (detailing the golden share retained in BTC), *at* http://www.elana.net/market/researches/BTC_26.09.2002_ENG.pdf.

545. *See* Case C-463/00, Commission v. Spain, 2003 E.C.R. I-4581, ¶ 71, [2003] 2 C.M.L.R. 18 (2003), ¶ 71 (stating that the objective of ensuring the provision of telecommunications service may "constitute a public security reason").

Petrom in Romania.[546] Using the Belgian system as a framework,[547] some governmental control and influence can be maintained provided that adequate safeguards are established to protect the affected investors.[548] There will likewise be some industries that cannot be protected. The Spanish ruling illustrates some such industries: tobacco and commercial banking.[549] It is also likely that, should the German case get to the ECJ, car manufacturing will also be excluded.[550] Nonetheless, there is a future for the use of a golden share in the EU.

C. *Effect of the Rulings*

The Court's rulings in the golden share cases removed a large obstacle to the ratification of a unified EU takeover law directive. Creating a common law regarding cross-border takeovers has been a goal of the EU since the Commission first expressed its intent to prepare a directive on takeovers in 1985.[551] The penultimate attempt to adopt a takeover directive failed,[552] in part because of vehement German opposition which was motivated by fear that its large companies, such as Volkswagen, would become a target for takeover activity.[553] Unexpectedly, the Council finally succeeded in adopting a takeover directive on December 16, 2003.[554] Though the adopted version falls short of the ideal directive envisioned by internal market commissioner Fritz Blokestein,[555] it is at least a step forward after fourteen years of disagreement. Though these six rulings will not

546. *See supra* notes 352-54 and accompanying text.
547. *See supra* notes 378-88 and accompanying text.
548. *See supra* Part II.B.3.
549. *See supra* notes 429-33 and accompanying text.
550. *See supra* notes 499-510 and accompanying text.
551. *See, e.g.*, Completing the Internal Market, *supra* note 154, at 29. For a summary of the developments and setbacks of the directive, see Proposal for a Directive of the European Parliament and of the Council on Takeover Bids, 2003 O.J. (C 45E) 1. The Commission presented the initial proposal on January 19, 1989. The latest attempt to pass the directive failed on July 4, 2001. *See* Eur. Parl. Doc. 2002 O.J. (C 65E) 57, 113 (Minutes, 4 July 2001). *See also* High Level Group Report (November), *supra* note 264; High Level Group Report (January), *supra* note 264; *Ruling Paves the Way for Pan-European Investment*, *supra* note 511.
552. *See* Eur. Par. Doc. 2002 O.J. (C 65E) 57 (Minutes, 4 July 2001). For a discussion of the actions taken by the Commission in reaction to the rejection of the directive, see Charles M. Nathan & Michael R. Fischer, *An Overview of Takeover Regimes in the United Kingdom, France and Germany*, PLI Corp. L. & Prac. 1163, 1200-01 (2002).
553. *See Equalising Shares; Governments Must Let Go of Privatised Companies*, Fin. Times, May 14, 2003, at 22.
554. *See* Daniel Dombey, *Parliament Backs Deal on European Takeover Directive*, Fin. Times, Dec. 17, 2003, at 3.
555. *See id.*; *MEPs Approve Embattled Takeover Law*, Euro. Voice, Dec. 18, 2003, *available at* 2003 WL 61201927; Daniel Schwammenthal, *EU Parliament Approves Watered-Down Takeover Code*, Dow Jones Int'l News, Dec. 16, 2003, *available at* WESTLAW, File No. 322-285-0131.

bridge all of the differences between the Member States and their approach to takeover law, they do alter the landscape of European takeover law. The underlying reasoning behind disallowing most uses of golden shares[556] may well be applied to other protectionist or defensive measures in the future, including the Volkswagen law.[557] Because it is clear that the Court draws from previous case law when facing new challenges, it is safe to say that the golden share rulings will have a role in future EU legal developments.

The Court, perhaps more than any other body, has promoted the realization of the Treaty's goal of a single European integrated market. Ultimately, this goal cannot be realized absent free movement of capital. In limiting the use of golden shares, the Court has taken an important step.

It is clear that the rulings limit the ability of Member States to use the powerful golden share tool as an effective defense to takeovers. For example, Portugal Decree law No. 380/93, which was declared incompatible with the Treaty in *Commission v. Portugal*,[558] was activated and used in 1998 to prevent a shareholder from acquiring more than ten percent of Portucel.[559] In 2000, the same law blocked a hostile takeover attempt of Cimpor.[560] It is unlikely that these companies would have been able to fend off takeover attempts in the absence of the golden share. The golden share rulings level the playing field to some extent, while still allowing Member States to protect essential national interests.

CONCLUSION

While the Treaty gives expression to the underlying spirit and purpose of the Community, it is the Court that breathes life into its express and implied rights and obligations. The ability of the Court to apply important principles to all of the freedoms has allowed Community law to develop quickly and more comprehensively than it otherwise might.

Drawing upon previous case law, the Court has formulated a framework for analyzing golden shares. Because of the fact-intensive nature of the inquiry into whether a specific golden share system is acceptable, this framework will certainly continue to be invaluable both to the nations hoping to maintain their golden shares, and to the Commission in evaluating which systems infringe upon the free movement of capital.

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556. *See supra* Part II.

557. *See supra* notes 500-02 and accompanying text.

558. Case C-367/98, Commission v. Portugal, 2002 E.C.R. I-4731, [2002] 2 C.M.L.R. 48 (2002).

559. *See* Câmara, *supra* note 12, at 511.

560. *See id.*

The rulings are very important for several reasons. First, on a practical level, they provide a framework for future analysis of golden shares.[561] Second, from a broader perspective, the decisions embraced some of the key principles, such as proportionality and legal certainty,[562] established regarding other fundamental freedoms, importing elements which can now safely be called fundamental principles, into the law of capital movements. Third, the judgments are a big step toward accomplishing an integrated market. Finally, on a practical level, the judgments provide guidance for future golden shares—they may still be used to protect vital public interests, thus the Court did not eviscerate Member States' ability to protect truly important national interests.

The decisions are not completely satisfying, however. The Court's refusal to face the Article 43 issue squarely[563] is frustrating, particularly in light of A.G. Ruiz-Jarabo Colomer's persuasive argument in favor of an establishment analysis. The Court has also failed to define adequately what is required to meet the legal certainty requirement. Thus, future golden share cases will play a role in clarifying these issues.

561. Many such systems still exist, and the Commission, perhaps emboldened by these decisions, has instigated action against other Member States. Undoubtedly, any of these infractions which end up before the ECJ will be subjected to the same scrutiny as the previous six were.

562. *See supra* notes 191, 216 and accompanying text.

563. *See supra* note 428 and accompanying text.

LECTURE

A SECULAR THEORY OF NATURAL LAW

*Lloyd L. Weinreb**

I appreciate the invitation of the Fordham Natural Law Colloquium to make this presentation. My topic is certainly within the Colloquium's jurisdiction, which is to say, it concerns natural law.[1] I shall ask you to put aside another version of natural law, with which you are likely much more familiar: the version expressed by Thomas Aquinas in the thirteenth century, which, since the fourteenth century, has been an integral part of the doctrine of the Catholic Church. It is not part of my purpose to question that doctrine or to argue that it is not properly called natural law. It is also true, however, that Thomistic philosophy did not arise in the thirteenth century out of thin air. If it was a new beginning, nevertheless it emerged out of a long tradition that had developed over more than 1,500 years and continued to develop after the fourteenth century in other directions. If Thomism represents the high point and greatest flourishing of natural law, that larger tradition has also to be considered.

I set the church doctrine of natural law aside because it is integrally, inextricably bound up with the Catholic faith. Natural law did not lead Thomas to that faith, which was unquestioned. His view of natural law proceeded from that faith and depended on it. It would be presumptuous of me, not sharing that faith, to speak about it to you. My topic is not religious but intellectual. That is not to suggest that natural law as a matter of faith is not also a matter of reason. It was, after all, Thomas's great achievement to show that faith and reason need not be altogether separate. But my topic is intellectual only, intellect unaided by faith.

The questions I want to address are first: Is there any theory of

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1. This Lecture was originally prepared as a talk for the Natural Law Colloquium, sponsored by the Law School and Department of Philosophy of Fordham University. The talk was presented at the Law School on December 1, 2003.

The material for the talk was drawn from two books: Lloyd L. Weinreb, Natural Law and Justice (1987) [hereinafter Weinreb, NL&J], and Lloyd L. Weinreb, Oedipus at Fenway Park: What Rights Are and Why There Are Any (1994) [hereinafter Weinreb, OAFP]. This Lecture is a largely unaltered transcription of the talk. References to the books on which it is based have been added.

natural law, any viewpoint or world view unaided by faith, that is properly called natural law? And second: If there is, is it worth our attention? My answer to both questions is yes.

The questions are hardly ever asked. A secular theory of natural law had a brief efflorescence after World War II, as a school of jurisprudence associated, in the United States, mainly with Lon Fuller.[2] It is not irrelevant that the wellspring of that jurisprudence was an agonized reaction to the phenomenon of Nazi law. As the agony has faded, so also has the jurisprudence that sprang from it. Ronald Dworkin has sometimes flirted with the notion of a secular natural law in his theory of a "right answer" or "law as integrity."[3] But it is only a flirtation, an effort to have all the girls at the dance on one's dance card. And even at that, Dworkin's is a theory of jurisprudence, which is not my main concern. Full-blown secular natural law has had little staying power and for the present has little influence. My intention is to return to the original natural law tradition, the tradition out of which the doctrines of Thomas emerged, and to ask whether, those doctrines apart, anything can be found in the tradition that speaks to our present circumstances.

A distinct philosophy of natural law emerged clearly in fifth century Athens. The opposing views pervaded Greek thought, not only philosophy but also history and literature, the great tragedies above all. It is expressed most forcefully in the tragedies of Sophocles, as his response to a profound debate about the significance, or meaning, of human existence—or rather, whether human existence has any significance or meaning beyond the events themselves. Is it finally the case, as Jocasta says to Oedipus, that "chance is all in all,"[4] or is there some larger stage on which human lives are played out? In philosophical terms, the debate was between those, like Plato, who believed that there is a natural order and those, notably the Sophists, who believed that order, however deeply rooted, is imposed by human contrivance. The idea of natural order (*physis*) beyond the contrived human order (*nomos*) meant more than bare causal order. The word for that was not *physis* but *tyche*, blind chance or necessity, without meaning. The order at stake, natural or human, was a normative order. I single out Sophocles among the three great tragedians because he stands between Aeschylus, whose view of the cosmos seems more religious than philosophical (although the Greeks would not have made the separation as we do) and Euripides, who repeats the formulas of divinely ordained natural order without much conviction, as, at best, part of the question. For Sophocles, the affirmation of moral order was a resolution, not a challenge or a

2. Weinreb, NL&J, *supra* note 1, at 101-08.

3. *Id.* at 117-22.

4. Sophocles, Oedipus the King 9, 52 (David Grene trans., Univ. of Chi. Press 2d ed. 1991) (n.p., n.d.) (line 977).

complaint. It meant that Oedipus's suffering, or Creon's or Philoctetes's, all different in their circumstances, was not merely the play of blind forces. However bitter, it was, when all was revealed, as it ought to be and, therefore, had to be.[5]

There is a direct line from these ruminations, by way of the Greek and Roman Stoics and later the Roman lawyers and Church fathers and Christian theologians, to Thomas Aquinas.[6] Cicero, not himself an original thinker, provided the phrase "natural law."[7] Brought into contact with Christian belief in a personal, all-embracing God, the normative natural order of the Greeks became Divine Providence, in which human beings, able in some measure to provide for themselves, have a share. Thomas Aquinas, of course, brought that to fruition in his doctrine of natural law:

> [T]he rational creature is subject to Divine providence in the most excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others. Wherefore it has a share of the Eternal Reason, whereby it has a natural inclination to its proper act and end: and this participation of the eternal law in the rational creature is called the natural law.[8]

In this way, natural law preserved the crucial elements of the Greek *physis*. It was real, and it was normative. Thereafter, aside from Christian theology, although the tradition of natural law continued, it lost that duality, which the intellectual separation of "is" and "ought" made impossible outside of religion. In the guise of a doctrine of natural rights as, still later, in jurisprudence, natural law became one kind of moral theory, the distinctive quality of which was that it was said to be true, even self-evidently true. Reality, or nature, and especially the interconnectedness of the right and the real was not in the case, except as an expression of what one took to be incontrovertibly true.[9] Puzzlement about humankind's place in nature was refashioned as a question of the relationship between the individual and the state, to which natural law in various guises, adapted to fit the theory at hand, provided an answer. It is instructive to look at the great political philosophers of the seventeenth and eighteenth centuries—Hobbes, Locke, and Rousseau—in that light.[10] In jurisprudence, the legal positivists accused the natural law theorists of confusing "is" and "ought," because they conflated questions about what the law is with questions about what the law ought to be, and, so the positivists said, asserted that a very bad law was not law at all.

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5. Weinreb, NL&J, *supra* note 1, at 15-35.
6. *Id.* at 43-66.
7. *Id.* at 39-42.
8. Thomas Aquinas, Summa Theologica I-II, Q. 91, art. 2 (Fathers of the English Dominican Province trans., Benziger Bros., Inc. 1947) (n.p., n.d.).
9. *See* Weinreb, NL&J, *supra* note 1, at 108-15.
10. *Id.* at 62-96.

Natural law theorists responded that the legal positivists made questions about one's obligation to obey law trivial. And in truth, for all the anguish that lay behind it, the whole debate seemed trivial. Because the case for natural law did not go beyond the assertion of moral certitude, it appeared that the debate had to do not with what is the case but merely with what label to apply.[11]

To the modern mind, the original conception of natural law, the idea of *physis*, a normative natural order, is simply a fundamental mistake. The separation of "is" and "ought," description and prescription, is not a theory or position; it is a given, where we start. It can, however, be demonstrated, I believe, that the idea of justice, as we understand and use it, contains an incoherence—the antinomy of freedom and cause at the individual level, and the antinomy of liberty and equality at the level of community—that only a conception of normative natural order resolves. Far from supplanting the Greek view, we have merely hidden the problem out of sight and agreed not to talk about it. And so the question is whether, without requiring too great a suspension of disbelief, there is any aspect of the real that contains an indisputable normative element.

I believe that there is. Oddly, the natural rights theorists had it right. But because their interests, both intellectually and practically, were not ontological but political, they did not recognize what they had and came out in the wrong place.

The place where nature and the moral order intersect is the matter of rights. The division between persons and things is an inescapable fact about our experience of the world. The distinction does not rest merely on physical or mental differences, although departures from the norm in those respects may make hard cases. Rather, the distinction is that persons are responsible and, as responsible, have rights; things are not responsible and have no rights.

We are looking for a place in the description of the world as it is that in and of itself implicates normative conclusions; that is, we are looking for a locus of the normative in nature. The only phenomenon that meets that description—as opposed to the view that nothing can meet it—is persons, regarded as bearers of rights. That rights have normative implications or, if you like, are normative concepts, is evident. Perhaps it is the case—*pace* Immanuel Kant—that rights can be overridden; but they unquestionably have a bearing, a strong bearing, on how one ought to behave. More controversial is the other side of the matter: that who has rights and what rights they have is a matter of fact.

For a start, the grammar of rights is instructive. We speak about many rights, many sorts of rights, in a normative mode. "Everyone ought to have a right to medical coverage." "Some groups in the

11. *Id.* at 97-101, 259-63.

population ought to have a right to preference for municipal jobs or college admissions"—or "No one ought to have such a right." "Gay persons ought to have a right to marry." The grammar changes when we reach the level of "natural rights" or "human rights." It is no longer appropriate to use the normative mode. "Everyone ought to have a natural right to food and shelter." "There ought to be a human right to reasonable employment." "Gay adults ought—or ought not—to have a natural right to engage in consensual sex." We do not speak that way (unless our words are surrounded with quotation marks) for good reason. Either there is such a right or there is not. Of course, the right may or may not be honored. And one can say that this country or that ought to honor the human right to food and shelter better than it does, or that it ought to recognize the human right to work, or that the Universal Declaration of Human Rights ought to include reference to some particular right. But to whom, to what, could a claim simply that something ought to be a natural right, which is to say, a human right, properly be addressed? Such a claim amounts to an assertion that the natural order ought to be different. Natural rights, or human rights, are asserted as a matter of fact, to which the proper response is not, "I think—don't think—that would be a good idea," or "I agree" or "I don't agree," but simply "True" or "False."[12]

The facticity of rights has always been the great stumbling block to an analysis of rights. Judith Thomson made rights the focus of years of fruitful scholarship, but in the end she says that rights are unanalyzable. They are simply "moral facts." Putting aside the objection that there are not supposed to be any moral facts, what are they? Thomson seems generally to disregard the implications of the very phrase she uses.[13]

The short response is: there are no moral facts, and there are no natural, or human, rights. To say that a right is "natural" or "human" is to say only that one thinks it is a very important right, one that ought to be recognized for all persons. Although the statement, "There ought to be a natural right to food and shelter" is meaningless, the statement that every nation ought to recognize a right to food and shelter for all its people is not. And, speaking carefully, that is all that the former statement means. It is a rhetorical flourish and nothing more. So, rights are only normative after all.

That method of avoidance does not work, because we need a concept of rights in its strong form to account for the difference between persons and things. That difference is a structural fact of our experience. And the core of the difference is the notion of responsibility, the difference between being the *cause* of some occurrence and being, in the full sense that implicates moral

12. Weinreb, OAFP, *supra* note 1, at 13-21.
13. *See id.* at 37-39.

judgment, *responsible* for it. By "structural fact" I mean a proposition that cannot be contradicted without altering the nature of our experience, not just in some concrete particulars but fundamentally, making it a different experience altogether. To deny that persons are responsible (or, for that matter, to assert that things are responsible) is not like denying that human beings have opposable digits or denying that any human beings live on Staten Island. Those propositions are startling enough, but we would adjust, if only by supposing that the denial was play-acting. Strict behaviorists may deny that human beings are responsible in this sense, but they do not behave as if it were so. If they did, we should lock them up. To deny the responsibility of persons does not merely contradict something that we believe strongly to be true. It transforms the nature of what we, as human beings, experience. To translate a description of behavior that we think responsible into a description entirely in terms of causes is not equivalent, because responsibility has no equivalent in those terms.[14]

Speaking about responsibility as the difference between persons and things, I referred to human beings, because broadly speaking, leaving aside troubling cases at the edges—infants, the very aged, the comatose—all human beings are persons, that is, are responsible beings. Again, leaving aside some possibly troubling cases—the Planet of the Apes—only human beings, defined simply by birth to a human mother, are persons. Those propositions would be tested if a creature from another planet altogether unlike us physically exhibited a sense of human responsibility. Would we regard the creature as a person? (To suggest the profound implications of the question, consider how an affirmative answer would affect the story of Genesis. Or consider how the story of Genesis indicates an answer.)[15]

There are many puzzles about responsibility. Hardest of all are not the cases of unusual individual beings or beings in stages of the life cycle in which responsibility is generally lacking. The latter cases are generally resolved by regarding birth to a human mother as establishing a conclusive presumption of personhood, even if responsibility is temporarily or permanently lacking. The presumption is accepted the more easily because persons who are indubitably responsible pass regularly through periods when they are not, like sleep. Rather, the hardest puzzle is the ordinary ascription of responsibility in the standard case of an adult, competent person. We take it for granted that one is responsible in a moral sense, the sense that implies desert, only for conduct that is self-determined. Just as a hurricane is not responsible in that sense for the devastation that it causes, and a puppy is not responsible for the mess it leaves on the

14. *Id.* at 45-46.
15. *See id.* at 101-13.

floor, a person is not responsible in that sense for bumping into someone if he is shoved from behind, for crying out if he is stuck with a pin, or for any of the conduct about which he might say, "I couldn't help it." Usually that is an empirical question, although there is plenty of ambiguity, plenty of difficult, close cases, and plenty of disagreement. But generally there is a pattern, understood and accepted by us all.[16]

The pattern is illustrated by our practice of excuses. Self-determination is not a quality of action that we observe, like speed or agility. We speak of someone acting with determination, not of acting with self-determination. But in a general way, even if conduct is of a kind for which we ordinarily regard persons as responsible, we regard as not self-determined conduct that has a recognized, identifiable causal explanation that places the person outside the endless variety of the ordinary. Not regarded as excuses are any of the ordinary qualities of one's nature—intelligence, good looks, physical strength, or their lack—or any of the ordinary qualities of nurture—loving, supporting, economically successful parents, or their lack. Some rise above their individual circumstances, and some fall below theirs. But we suppose that attributes such as industriousness and determination (not self-determination) are also a product of nurture and, more and more it turns out, nature—the chemical composition of the body, the shape and mass of the brain—both beyond our control.

In fact, the determinist argues that everything we are now is traceable to who, what, we were, in an unbroken chain of cause and effect, circumstance and consequence. That is true as a matter of fact, since whatever else we may be, we are part of the natural order. And it is true as a matter of principle. For if an action that a person takes now is not, however indirectly, a determinate consequence of the person's individual attributes that are themselves fully determined in the same way, how is it anything more than happenstance, not his normatively, in a way that makes him responsible, but only an event that happened to him, in which he happened to be embroiled, much as Oedipus was unwillingly and unwittingly embroiled in the destiny of the Theban royal house and, despite himself, fulfilled the oracle's prophecy that he would kill his father and commit incest with his mother.[17]

The notion of human responsibility requires that our acts be free, that is to say self-determined and not determinate. But, at the same time, unless an act is fully determined by the person as he is and not by anything else, it is not his in the necessary sense. It is a true antinomy, not resolvable by halves, some of one and some of the

16. *See id.* at 40-65.
17. *See id.* at 46-51.

other. The autonomy on which responsibility and desert depend requires that actions be fully undetermined and fully determined.

The scope of the antinomy is indicated by our extraordinary, not to say desperate, solutions. For the ancient Greeks, the solution was that Oedipus was responsible for the circumstances of his being, that to be Oedipus, the person that he was, was to do as he did. Responsibility attaches to his self, because the natural order is itself normative. We, of course, reject that solution out of hand. We are not responsible for what we cannot help. Some years ago, an official in the Department of Education, evidently a student of classical Greece, asserted publicly that a person should be held responsible for physical handicaps due to birth defects, which the official said reflected a person's inner worth. The official was excoriated in the press and finally resigned from her government position.[18] Kant's solution was to remove the autonomous self to an ineffable, noumenal plain, from which all traces of the phenomenal, causally determinate self are removed. But, of course, we are interested in the actions of the responsible self within the phenomenal universe. The person whom we reward and punish is the phenomenal self, with all those actual attributes. Kant's argument, as he acknowledged, is not a solution but a thorough, rigorous statement of the problem. Or the currently favored approach of Strawson and others: There simply are two perspectives, the scientific and the moral. There is no unified perspective, nor need there be. All that is required is to specify the point of view. But it is not so, again because the person to whom we respond one way or the other is one and the same person, acting freely or not, with all his characteristics, his self.[19]

Abstracted from reference to an individual person, the puzzle of human responsibility is lodged within the notion of justice. Hence, the title of my book, *Oedipus at Fenway Park*. If Oedipus's fate was, as we think, unjust, why is it just that Roger Clemens gets to play for the Red Sox (as it then was) rather than some young man who desperately wants to play in the major leagues but has a bad pitching arm, never makes a base hit, and bobbles the ball in the field—all of which he tries ceaselessly to overcome. Our response is peremptory: Clemens just is a better ball player. He *is* Roger Clemens, and being Roger Clemens, the person that he is, he deserves to play for the team. But isn't that like the Greek answer to the fate of Oedipus—he is Oedipus—an answer that we reject out of hand? Nor can the two cases be distinguished because baseball is only a game. Try telling

18. *See* Philip Shenon, *Weicker and Education Chief in Sharp Clash*, N.Y. Times, Apr. 17, 1985, at B4; *The Philosopher and the Handicapped*, N.Y. Times, Apr. 18, 1985, at A26; Stephen Engleberg, *Two Aides Quit Education Dept. in Dispute Over Views on Disabled*, N.Y. Times, Apr. 19, 1985, at A19; *Handicapping Education*, Newsweek, Apr. 29, 1985, at 33.

19. *See* Weinreb, OAFP, *supra* note 1, at 51-55.

that to the young man—or, one might add, to all those Red Sox fans who waited out those extra innings last October. But, in any case, just the same argument might be made across the river, where the question is not who plays for the Red Sox but who is admitted to Harvard. That, we all agree, is not a game, or not only a game.[20] In this way, the antinomy of freedom and cause is reflected in the antinomy of desert and entitlement. The former reflects the individual, autonomous actor, responsible and incurring desert. Entitlement reflects the just background order that alone gives meaning to individual responsibility and desert. And rights are the means by which we make the distinction.[21]

To say that a person has a right to do, or to be, something is to say that he is responsible for what he does or is. Nothing more. That, and only that, is the source and explanation of the facticity of rights. Having a right to do something does not mean that one will do it or ought to do it. More often than not, the assertion of a right suggests that perhaps one ought not act in that way. A right to do something is also, necessarily, a right not to do it; for if one did not have a right not to do it, there would be no point in saying that one has a right to do it. Rights constitute our autonomous selves. Having a right, one is responsible for its exercise (or nonexercise). Not having a right, one is subject to the causal order of nature or, as we usually think of it, to a humanly imposed constraint; one is not responsible and does not incur desert. The normative natural order is the order in which we, as natural beings, are also bearers of rights and exercise responsibility.[22]

That is a lot to swallow. Let me elaborate and add some footnotes. I am speaking of rights as attributes of a person simply as a person, not as American or British, professor or student, member of this club or that. That is, since all human beings are persons and all persons are human beings, I am speaking of human or, as they used to be called, natural rights. In any more particular role, as an American or professor or club member, a person may be granted additional rights, or not granted additional rights that others are granted, for instrumental reasons. If additional rights are granted, then within the bounds of and according to the terms of the community that grants them, a person is responsible for what he does. To say that one has a right is not necessarily to say that the right is honored, and if it is not, within that community a person is not responsible for the consequence in question. To say that a person does not have a right is not necessarily to say that he lacks the power; and if he exercises the power, he will be subject to blame for acting without right. But if a person does exercise the power, albeit without right, it demonstrates that he has the right to liberty that enables him to do so. So a thief,

20. *Id.* at 66-73.
21. *See* Weinreb, NL&J, *supra* note 1, at 184-223.
22. Weinreb, OAFP, *supra* note 1, at 74-100.

who has no right to steal a wallet, is responsible for doing so, and subject to punishment, is able to do so only because he has the right—the right to liberty—to determine his conduct. It would be another matter entirely if he lacked that right. Then we should put him in a cage—or prison—and prevent him directly from stealing a wallet.

Because we tend to think of rights as things that can be granted or withheld, honored or ignored, it is easy to think of them not as a matter of fact but as something that one ought, or ought not, to have. But it is just that facticity of rights—moral facts—that gives us all the difficulty. In just the same way, responsibility is a matter of fact (although it may be a much contested matter of fact). A person is or is not responsible for this or that. It makes no sense to say that a person ought to be responsible. That is like saying a chipmunk ought to be responsible. To whom could such a statement be addressed? Of course, a person may behave responsibly or not, and if the latter, he may incur blame. But a person incurs no blame if he is not in fact responsible for the conduct in question.

For human beings, therefore, apart from nature and a part of it, rights specify the boundary between constitutive attributes, those that define us individually as autonomous, responsible beings, and circumstantial attributes, those that happen to us, with respect to which we are natural beings, within a chain of cause and effect. So long as we refer to a person's attributes descriptively, there is no need to distinguish constitutive and circumstantial attributes. But when we refer to a person normatively, as an autonomous being, acting responsibly and incurring desert, there is a need to make that distinction, because he is not responsible for, and incurs no desert for, circumstances that happen to him, not by him. Circumstantial attributes are subject to amelioration or limitation for instrumental reasons, reasons of social policy, because they are not deserved but merely circumstantial. Constitutive attributes, on the other hand, are deserved and constitute a person as he is normatively, and they may not justly be limited or, without unjustly depriving some other, ameliorated.[23]

Consider affirmative action. Are the educational handicaps of many African-Americans in this country—lack of family models, parents who are not alumni of prestigious institutions, bad schooling—constitutive or circumstantial? If they are constitutive, simply who that person is, like Roger Clemens's good right arm, then they are deserved, and there is no reason why they should be ameliorated by affirmative action. But if they are circumstantial, the effects of circumstances without normative significance, then they are undeserved and ought to be ameliorated, in order to satisfy the demands of justice. Amelioration, of course, is not cost-free. It

23. *Id.* at 87-100.

requires the limitation of someone else's opportunities to use his favorable attributes to his advantage, and, unless those attributes are not constitutive, the limitation will be unjust.[24] The same could be asked of other attributes, such as a high IQ or low IQ, with respect to anyone. We can always ameliorate or the reverse, if not directly, then by the example of the Wizard of Oz. If we cannot give the Scarecrow a brain, we can give him a college degree. If we cannot give the Cowardly Lion courage, we can give him a medal and a seat on the dais, which is probably all he wanted anyway. And if we cannot take away the powers of the Wicked Witch of the West, we can tax her profits. So long as a person has her rights, and only her rights, responsibility makes sense and the demands of justice are met. If a person has more or less than what she has a right to, justice is denied.

But isn't this manner of speaking—the constituted self and its attributes, and the circumstantial self and its attributes—willfully confusing? There is, after all, only one person with all her attributes. Yes. So long as the matter at hand is not a matter of the person's desert—or responsibility. If that is our concern, then attention to the distinction is unavoidable, because desert depends on responsibility, and responsibility depends on the freedom that is the antinomy of cause; that is to say, it depends on rights. The unity of our being is not a part of the puzzle; rather, it is an essential aspect of the solution. Responsible conduct is self-determined, that is both not determined and fully determined according to one's self. That is the human condition, and only the human condition. Things, animals, are not persons, they are not responsible, and they do not have rights. So also, angels, whose nature it is always to will the good, have no rights. They have no need of them. Responsibility, for angels, is out of the question.

What rights, then, does a person have? Proceeding from the premise that all and only human beings are persons, what human rights are there, rights that all humans, merely as humans, have? Rights are an implication of autonomy, or personhood, so we start from there. I should say that the human rights are these:

1. The right not to be subjected to constraints too great to be resisted. Since human beings are, as a matter of fact, persons, they must have a domain of autonomous action that is not restricted by the power of others.

2. The right to physical and mental well-being. Perhaps it is always possible to try. But one must have some capacity, some possibility of effective action, to believe that it is worthwhile to try. So there is a right to well-being. The satisfaction of basic human needs—food and shelter—is an aspect of this right.

3. The right to education. Effective agency, autonomous action, is

24. *See id.* at 181-95.

a matter of intellect as well as will. One must have a capacity to reflect congruent with one's situation.

4. The right to moral consciousness. One must be aware of oneself as not merely a source of power, like an electrical storm or a wild beast, but as a moral actor. One has a right to development as a moral being.

5. The right to moral opportunities. One must not have all one's choices made for one, even if they are made in one's favor. One must not be so educated or trained, like Rousseau's citizen or Winston in *Nineteen Eighty-Four*[25] that he always chooses the good, or what passes for the good. Angels are not persons. There is a human right not to dwell in paradise.[26]

Other human rights are sometimes mentioned. The right to what one has. The right to equal dignity and respect. The right to life. Each of these asserted rights refers to some value that may be thought to be of great, even overriding, importance. I do not want to contradict that. I should say, however, without elaborating the point here, that none of those rights is an indisputable condition of responsibility. For that reason, I qualify them not as rights but rather as basic components of the good.[27]

The human rights that I have identified are glaringly imprecise. And, inasmuch as they belong to all human beings, they do not differentiate among individuals. Yet responsibility is insistently individual. How do we justify concretely differential individual attributes? The former issue—the rights common to all—are important, desperately so, in a world where so often rights are denied for so many. But we need also to understand the basis for differential rights, not the rights that we all have in common, but the rights that each of us as an individual has, which differentiate us normatively. We do not start from an abstract principle. Autonomy is not a derivation of reason (even for Kant, whose moral theory sought not to derive autonomy from reason but rationally to derive the conditions of autonomy, taken as a given). We start from the concrete experience of persons as persons, and consequently the direction of thought is from concrete particulars to the abstract and general. The source of individual rights that differentiate us one from another is found in experience. One must look to the deep normative conventions of the community for the bounds of personhood, what is constitutive and what circumstantial. That is not to say that whatever is, is right. Rather I mean what the Ancient Greeks meant by *nomos*, the constantly reconsidered, deepest, weightiest aspects of a community's way of life, what we commonly refer to as civil rights.

25. George Orwell, Nineteen Eighty-Four (Penguin Group 2003) (1949).
26. Weinreb, OAFP, *supra* note 1, at 114-22.
27. *Id.* at 122-36.

Not only the contested, potentially vulnerable rights we usually refer to as civil rights—the right to vote, the rights specified in the Bill of Rights—but also, and more important, the deepest understanding about the contradictory values of liberty and equality that define a community: What an individual can withhold from, or demand from, the community, and what the community can demand from, or withhold from, an individual. The rights that define a person are always in some state of flux. They conjoin what is and what ought to be. In that way, the abstract conjunction of is and ought is brought concretely down to earth.[28]

Issues about affirmative action are so difficult because the community's way of life is deeply conflicted. The intractable question is how to regard the differential attributes of African-Americans and others who have been and are deprived as not deserved, not constitutive, and, therefore, appropriate for amelioration, without regarding the differential attributes of others who have fared better as similarly not constitutive and, therefore, appropriate for limitation. Both sides perceive the issue, correctly, as a matter of justice, because their individual worth, or desert, is at stake, according to the *nomos* of the community.[29] So also, to answer the question whether a person who is gay has distinct rights associated with sexual orientation, one must look to the actual practices of the community. In 1994, when my book *Oedipus at Fenway Park* was published, I concluded that the *nomos* of this community, reflected in open acknowledgement of gay sexuality by public figures, participation of openly gay persons in every kind of public event, frank portrayal of gay sexuality in the theatre, movies, fiction, and so forth, indicated a right to one's own sexual identity, whether deliberately chosen or not.[30] The Supreme Court's decision in *Lawrence v. Texas*[31] confirmed that. But that is not so in every country and, even in the United States, such a conclusion is as tenuous as the public attitudes on which it rests.

So, to return to the beginning, can what I have outlined properly be regarded as a theory of natural law? The answer, I think, is yes. It is a theory that locates the normative aspect of our existence within the natural order, in the irrefutable designation of human beings as persons. And is it worth our attention? Again, the answer is yes. The theory does not itself provide us with a moral calculus, nor even a moral compass. It requires us to look toward and beyond the actual conditions of the community in which we live. But it is not without significance. Its largest significance is that it rejects a utilitarian calculation of the good as sufficient in itself. It insists that the recognition of persons as persons, honoring their rights, is the only

28. *Id.* at 137-56.
29. *Id.* at 181-95.
30. *Id.* at 171-78.
31. 123 S. Ct. 2472 (2003).

path to the good, not the highest good perhaps, but the humanly good. And it tells us, without providing a certain guide to success, the manner and means for achieving it.

ESSAY

UNIVERSITY DONS AND WARRIOR CHIEFTAINS: TWO CONCEPTS OF DIVERSITY

*Thomas H. Lee**

INTRODUCTION

By deciding in *Grutter v. Bollinger*[1] to "endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions,"[2] the Supreme Court has ended one debate but invited another. The burning question whether Justice Powell's opinion in *Regents of the University of California v. Bakke*[3] is binding on the point[4] is now moot. Nor is it open to doubt that an affirmative-action policy with diversity as its end can survive strict scrutiny under the Equal Protection Clause.[5] But just how far the diversity rationale can justify race-based policies in educational and non-educational contexts is certain to be a focus of future cases and controversy.[6]

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1. 123 S. Ct. 2325 (2003).

2. *Id.* at 2337.

3. 438 U.S. 265, 311-12 (1978) ("[T]he attainment of a diverse student body . . . clearly is a constitutionally permissible goal for an institution of higher education.").

4. *Compare, e.g.*, Grutter v. Bollinger, 288 F.3d 732, 741 (6th Cir. 2002) (en banc) ("Justice Powell's opinion . . . provides the governing standard here."), *and* Smith v. Univ. of Wash. Law Sch., 233 F.3d 1188, 1201 (9th Cir. 2000) ("Thus, at our level of the judicial system Justice Powell's opinion remains the law."), *with* Johnson v. Bd. of Regents of the Univ. of Ga., 263 F.3d 1234, 1248 (11th Cir. 2001) ("[T]he fact is inescapable that no five Justices in *Bakke* expressly held that student body diversity is a compelling interest under the Equal Protection Clause."), *and* Hopwood v. Texas, 236 F.3d 256, 274-75 (5th Cir. 2000) (holding the same).

5. No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

6. In light of the Court's companion holding in *Gratz v. Bollinger*, 123 S. Ct. 2411, 2427-28 (2003), striking down the University of Michigan's undergraduate admissions policy for lack of individualized inquiry to achieve the compelling interest in diversity, the question of narrow tailoring will also be much contested.

This Essay proposes a framework for clarifying the diversity rationale in *Grutter*. The Court itself gave the first clue. It is not the mere fact of student body diversity that is the compelling interest, but rather "obtaining the educational benefits that flow from a diverse student body."[7] This formulation, however protean, does suggest a substantive doctrinal test when viewed in conjunction with the *Grutter* Court's analysis of the compelling interest in diversity. Such a "benefits" test would turn on three elements. A compelling state interest exists when the university (1) identifies "the educational benefits that [student body] diversity is designed to produce;"[8] (2) shows that attaining those benefits is "essential to its educational mission;"[9] and (3) makes a showing that a diverse student body "will, in fact, yield [those] educational benefits."[10]

This Essay proposes that there are two distinct categories of educational benefits of student body diversity and that there is marked variation in the extent to which higher educational institutions seek to and in fact confer the two sorts of benefits. Accordingly, the compelling interest test as formulated in *Grutter* should, by its own terms, take account of this variation in mission and causation, with the logical consequence that student body diversity might not suffice as a compelling government interest in every higher educational context.

The first type of educational benefits of student body diversity is what I shall call "discourse" benefits. There are benefits to students, the university, and society arising from the discourse and interactions *all* students will have on a racially diverse academic campus.[11] Racial diversity at the university "promotes cross-racial understanding, helps to break down racial stereotypes, . . . enables students to better understand persons of different races . . . [and produces] classroom discussion [that] is livelier, more spirited, and simply more enlightening and interesting."[12] The discourse benefits of student body diversity also include benefits that are "educational" not in the sense of "pedagogical" or pertaining to the educational setting, but in the different yet seemingly valid sense of lessons learned at school applied to society and life at large.[13]

On the other hand, there are benefits to society when *minority* students are graduated from the few highly selective "gate-keeping"

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7. *Grutter*, 123 S. Ct. at 2338 (internal quotation marks omitted).
8. *Id.* at 2339.
9. *Id.*
10. *Id.*
11. *See id.; see also* Jack Greenberg, *On* Grutter *and* Gratz*: Examining "Diversity" in Education: Diversity, the University and the World Outside*, 103 Colum. L. Rev. 1610, 1618-19 (2003).
12. *Grutter*, 123 S. Ct. at 2339-40 (internal citations omitted).
13. "[S]tudent body diversity promotes learning outcomes, and better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." *Id.* at 2340 (internal quotation marks and citations omitted).

schools that employ race-based admission programs (only twenty percent of the nation's colleges and universities)[14] and assume professional positions of leadership in nationally sensitive, non-educational institutions like the military officer corps,[15] "major American businesses,"[16] Congress,[17] and the federal judiciary.[18] Leadership diversity is in turn a compelling need for a racially diverse society. In articulating the logic of what I shall call the "leadership" benefits of student diversity, the Court was not, as it purported, simply "endorsing" Justice Powell's *Bakke* opinion.[19] Rather, the *Grutter* Court was adopting an altogether different reason to find diversity a compelling interest in the higher educational context.

The Court was powerfully influenced in this regard by an amicus brief filed by twenty-nine retired military officers and civilian leaders of the U.S. armed forces.[20] The military leaders argued that "based on their decades of experience, a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its princip[al] mission to provide national security."[21] The military's claim was that the military academies and Reserve Officers Training Corps ("ROTC") programs at civilian colleges sought diverse student bodies because students will automatically become leaders of the armed forces upon graduation and a diverse officer corps is essential to

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14. *See* William G. Bowen & Derek Bok, The Shape of the River 15 & n.1 (1998); Daria Witt et al., *Introduction to* Compelling Interest: Examining the Evidence on Racial Dynamics in Colleges and Universities 9 & n.4 (Mitchell J. Chang et al. eds., 2003) (citing regression analysis indicating that "only the top 20 percent of colleges and universities have an admissions policy that employs a significant degree of racial preference").

15. *Grutter*, 123 S. Ct. at 2340.

16. *Id.*

17. *Id.* at 2341.

18. *Id.*

19. *Accord* Kenneth L. Karst, *The Revival of Forward-Looking Affirmative Action*, 104 Colum. L. Rev. 60, 60 (2004) ("The *Grutter* opinion . . . justif[ies] affirmative action for a purpose Justice Powell had not mentioned.").

20. Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-241, 02-516), 2003 WL 1787554 [hereinafter "Military Brief"].

I served, in 1994 and 1995, as a U.S. naval cryptology officer on the personal staff of one of the amici, Admiral Archie Clemins, who was then Commander, U.S. Seventh Fleet. This Essay does not reflect the views of Admiral Clemins.

The leadership diversity argument of the Military Brief was importantly supported by amici briefs filed by prominent American corporations, which made the same point as to American economic power. *See, e.g.*, Brief of General Motors Corporation as Amicus Curiae in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-231, 02-516), 2003 WL 399096, at *23-*24; Brief for Amici Curiae 65 Leading American Businesses in Support of Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003), Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (Nos. 02-231, 02-516), 2003 WL 399056, at *1.

21. *Grutter*, 123 S. Ct. at 2340 (quoting Military Brief, *supra* note 20, at *5) (internal quotation marks omitted).

national security. The Court accepted that "'it requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.'"[22]

The selective military academies represent the strongest case for the gate-keeping leadership benefits of student body diversity. Liberal arts colleges represent the strongest case for diversity's discourse benefits. The Court casually assumed that all civilian universities with race-based admissions policies, including colleges, likewise stake a persuasive claim to leadership benefits,[23] but this is a questionable assumption for three reasons. It is debatable, first, because unlike military academies and professional schools, selective colleges do not claim that specialized professional training, even in an institutional leadership capacity, is one of their principal educational missions. This is unlike the exchange of ideas among diverse students, which is at the "very core" of their educational mission.[24] Second, in America today, those who seek leadership in nationally essential institutions must increasingly obtain further training at graduate and professional schools[25] that do seek to provide such tailored training, and this necessarily dilutes the causal claim of undergraduate institutions to leadership benefits. Third, with the exception of the officer corps, the individuals and electorates who appoint such leaders have complete discretion in choosing minority and other candidates, including the freedom to disregard whether he or she was admitted and completed an undergraduate program of study at an elite school. This further dilutes the causal claim of top civilian colleges to leadership diversity benefits. Prestigious colleges may supply a disproportionate share of the nation's leaders, and they may claim that they mold leaders in a broad sense, but correlation is not causation and generalized aspiration is not educational mission.

This leads to an interesting question: If institutional leadership or professional benefits are not central to the mission of elite undergraduate schools, and student body diversity at these schools does not cause these benefits in a meaningful way, i.e., in a way comparable to the gate-keeping military academies and specialized graduate and professional schools, is it still a compelling government interest in light of the many direct and indirect benefits of diverse

22. *Id.* (quoting Military Brief, *supra* note 20, at *29).

23. *Id.* at 2341.

24. Brief for Respondents, Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (No. 02-241), 2003 WL 402236, at *28-*29 (discussing law school's mission) [hereinafter *Grutter* Respondents' Brief]; *see also* Brief for Respondents, Gratz v. Bollinger, 123 S. Ct. 2411 (2003) (No. 02-516), 2003 WL 402237, at *21-*26 [hereinafter *Gratz* Respondents' Brief]; Neil L. Rudenstine, *Student Diversity and Higher Learning*, *in* Diversity Challenged: Evidence on the Impact of Affirmative Action 38-39 (Gary Orfield ed., 2001); *infra* Part II (comparing educational mission statements of highly selective military academies and similarly selective civilian colleges).

25. *See* Bowen & Bok, *supra* note 14, at 91; *infra* Part II.

discourse on campus, which is the core of their mission? The question appears to be settled as a doctrinal matter. The Court in *Gratz v. Bollinger*, relying on *Grutter*, summarily accepted that student body diversity at the University of Michigan's College of Literature, Science, and the Arts, was a compelling government interest.[26]

But I am not so sure that this was right, both on the terms of the *Grutter* "benefits" test and as a matter of education policy. The robust exchange of diverse ideas on campus is certainly essential to the elite colleges' educational mission. But if, because of the benefits of diverse campus discourse, student body diversity is a compelling state interest for the twenty percent of the nation's colleges that use affirmative action, then surely it must be so for the eighty percent of colleges that do not. And affirmative action, to the extent it ensures that our most selective colleges, as a class, can enroll the "highly qualified" minority students that they could not have admitted but for race-based policies, would necessarily set back the compelling interest in student body diversity at non-elite colleges as a group. The bottom line is that absent a claim to gate-keeping leadership benefits, the elite colleges' claim to compelling interest in student body diversity (for discourse benefits alone) stands on shaky ground.

The first part of this Essay describes the discourse benefits of student body diversity. The second explains the contrasting logic of leadership benefits. The third part summarizes how different educational institutions seek to and bring about one sort of benefit and/or the other.

I.

What I have called "discourse" benefits are the core "educational benefits" of student body diversity, and they are, unsurprisingly, grounded in "the expansive freedoms of speech and thought associated with the university environment."[27] The premise is that the university is a special First Amendment community, whose fundamental mission is the "robust exchange of ideas."[28] The university's administrators, as the moderators of this community, may exercise within a roomy but reasonable zone of discretion "the right to

26. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2426-27 (2003) ("Petitioners . . . argue that diversity as a basis for employing racial preferences is simply too open-ended, ill-defined, and indefinite to constitute a compelling interest capable of supporting narrowly-tailored means. But for the reasons set forth today in *Grutter v. Bollinger*, the Court has rejected these arguments of petitioners." (internal quotation marks and citations omitted)).

27. *Grutter*, 123 S. Ct. at 2339.

28. *Id.* (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (Powell, J.)).

select those students who will contribute the most to the 'robust exchange of ideas.'"[29]

This is just what the university has done in implementing race-based admissions policies. It has made an "educational judgment"[30] that the presence of certain minority students who would not be enrolled but for affirmative action is "essential to its educational mission"[31] of promoting discourse on campus. There is evidence that the fact of being a minority affects a person's life experiences and the conclusions she draws from them.[32] "[T]he presence of persons who have had such experiences enriches the educational environment, if only because it is human nature to undervalue or fail to see burdens that we haven't truly experienced ourselves."[33] This sort of sharing occurs not only in the classroom, where a variety of backgrounds will make discussion "livelier, more spirited, and simply more enlightening and interesting,"[34] but through the myriad informal interactions that take place on campus.[35] In order to ensure that minority perspectives are not reduced to single voice-in-the-wilderness stereotypes, it is necessary to admit minority groups in sufficient numbers ("a critical mass") to impart the confidence to speak out and to stay faithful to differences within the groups.[36]

The Court, while relying on the "countervailing constitutional interest"[37] of the university's free-speech rights, did not speak of particular doctrines and otherwise remained noticeably vague on the issue of deference on First Amendment grounds. Justice Thomas, joined by Justice Scalia, fairly called the majority to task on the

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29. *Id.* (quoting *Bakke*, 438 U.S. at 313).

30. *Id.*

31. *Id.*

32. *See id.* at 2341 ("Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one's own, unique experience of being a racial minority in a society, like our own, in which race unfortunately still matters."); *Grutter* Respondents' Brief, *supra* note 24, at *22-*24; *Gratz* Respondents' Brief, *supra* note 24, at *25 ("Racial and ethnic diversity is educationally important because, notwithstanding decades of progress, there remain significant differences in our lives and perceptions that are undeniably linked to the realities of race.").

33. *Grutter* Respondents' Brief, *supra* note 24, at *24. See also *Bakke*, 438 U.S. at 312-13 n.48, where the then-president of Princeton University, commenting on the benefits of a diverse student body, noted: "People do not learn very much when they are surrounded only by the likes of themselves."

34. *Grutter*, 123 S. Ct. at 2340 (citations omitted).

35. *See Bakke*, 438 U.S. at 312-13 n.48.

36. *See Grutter*, 123 S. Ct. at 2341. The Court noted:

> The Law School does not premise its need for critical mass on any belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue. To the contrary, diminishing the force of such stereotypes is both a crucial part of the Law School's mission, and one that it cannot accomplish with only token numbers of minority students.

Id. (internal quotation marks and citation omitted).

37. *Bakke*, 438 U.S. at 313.

point.[38] An attempt at specification may help in understanding why the Court deferred to the university's judgment that the discourse benefits of student body diversity were compelling enough to validate a race-based admissions policy.

Three different free-speech doctrines seem relevant as analogies—lines of cases concerning public fora, the government as subsidizer of speech, and the government as educator. Public-forum doctrine allows the state to impose conditions on speech occurring on certain public property so long as its regulation is not content-based. As a subsidizer of speech, the government may "encourage certain activities it believes to be in the public interest"[39] provided that it does not discriminate based on viewpoint.[40] As educator, the government is allowed leeway in how it manages the educational setting, even when it exercises considerable editorial discretion over student speech.[41]

No case has ever held, nor did the University of Michigan and its friends argue, that the university campus is itself a public forum,[42] and my point is not that it should be. Rather, the public-forum rubric is important as an analogy. A basic intuition behind the doctrine[43] is that the government has an obligation to permit and protect a robust exchange of ideas in public parks, streets, and sidewalks—traditional venues accessed typically by those lacking the wherewithal to publicize their ideas by other means.[44] Restrictions on under-resourced speech in public fora—just like censorship of it—would snuff out the desired communication for all time, to the detriment of a

38. *See Grutter*, 123 S. Ct. at 2350, 2357 (Thomas, J., concurring in part, dissenting in part).

39. Rust v. Sullivan, 500 U.S. 173, 193 (1991).

40. *See id.*

41. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) ("The principal's decision . . . was reasonable under the circumstances as he understood them."). *Compare* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (high school cannot discipline students who wore black armbands to protest Vietnam War), *with* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (high school can discipline student for "offensively lewd and indecent speech").

42. *Cf. Hazelwood*, 484 U.S. at 270 (high-school newspaper not a public forum); S.E. Promotions, Ltd. v. Conrad, 420 U.S. 546, 555 (1975) (community theater a public forum).

43. Another premise of the doctrine—more clearly associated with the restriction on content-based regulation in public forums—is equal access: Once the government has set up a public forum, it cannot pick and choose the content of the speech that will take place, although it may engage in regulation of the forum for reasons unrelated to speech, such as public order and safety. Just as the norm of equal access, however problematic its application to cases may be, compels content-neutrality in avowedly non-speech regulation that the government may undertake, the state's promulgation of affirmative action for the sake of all the "educational benefits" of a racially diverse student body (not just the First Amendment-associated discourse benefits discussed in this part) does not on its face disadvantage any specific content in the campus exchange of ideas.

44. *Cf.* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515-16 (1939).

democratic society whose legitimacy lies in the responsiveness of the political process to the voices of all of its citizens. This idea of basic access to the marketplace of ideas, made imperative by the implicit risk of non-substitutability by transmission in another medium, is an enduring First Amendment theme that has appeared in contexts other than public fora.[45]

The analogy applies to the university affirmative-action cases in a straightforward way. Without affirmative action, there would not be enough "under-represented minorities" on elite campuses to ensure an accurate communication of minority student perspectives in the university marketplace of ideas, just as, without the provision and protection of public fora, the voices of under-resourced citizens might similarly go unheard. The "token numbers"[46] of certain minorities in the student body that would result from a race-blind admissions process might refrain from speaking without the safety and moral support of numbers,[47] or be stereotyped by the majority when they do.[48] Campus exchanges, absent affirmative action, would accordingly be an imperfect marketplace of ideas,[49] unfaithful to the multi-racial democratic society that the university is seeking to serve, in the same way that freedom of speech would be a sham if under-resourced citizens with no other options were denied basic access to public fora.

Or the Court may have been thinking about the First Amendment right of the state as subsidizer of speech. The government in this capacity may promote a desired activity—such as cross-racial discourse—so long as it does not discriminate against certain viewpoints.[50] The University of Michigan and its friends went to great lengths to point out that their affirmative-action programs did not discriminate on the basis of the viewpoints held by the minorities who benefited.[51] In fact, the idea of the "critical mass" envisions the

45. *See* City of Ladue v. Gilleo, 512 U.S. 43, 57 (1994) ("Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute.").

46. Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003).

47. *See* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 323 (1978) ("Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential.").

48. *See Gratz* Respondents' Brief, *supra* note 24, at *28 ("Put bluntly, teaching that not all blacks think alike will be much easier when there are enough blacks around to show their diversity of thought." (internal quotation marks and citation omitted)).

49. *See* Mitchell J. Chang, *The Positive Educational Effects of Racial Diversity on Campus*, *in* Diversity Challenged: Evidence on the Impact of Affirmative Action 179 (Gary Orfield ed., 2001).

50. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998); Rust v. Sullivan, 500 U.S. 173, 193 (1991); *cf.* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 832-33 (1995).

51. *See, e.g.*, *Grutter* Respondents' Brief, *supra* note 24, at *30 (noting that the

selection of minority students of various viewpoints, to cancel stereotypes and to be faithful to variation of views within the minority group.[52]

The idea of the government as educator is not so different from the vision of it as subsidizer of speech; the main difference being the greater degree of deference owed to the state when it is actually running the educational enterprise. The basic premise is that public schools are allowed discretion in going about their educational missions, indeed, in defining those missions, even when the result is the substantial restriction or elimination of student speech. Although the case law acknowledging this deference developed in the context of high-school students whose countervailing free-speech rights might plausibly be more curtailed than those of adult university students,[53] the state as educator in our case is using affirmative action to encourage speech, not to restrict it, albeit exerting editorial discretion by promoting a certain kind of race-inflected speech.

The distinction between deference to the state as subsidizer of speech and the greater deference due to it as educator in its own right logically gives rise to a distinction in compelling government interest analysis between public and private universities. On the one hand, when the state or federal government is educator, it may have to look to the benefits of the public-education enterprise as a whole, whether state or nationwide, rather than to what is best for a particular public school in the system.[54] By contrast, the private institution of higher learning necessarily formulates its compelling interests more narrowly in terms of what is good for itself. Accordingly, to the extent that affirmative action at elite public universities promotes diversity on those campuses at the cost of racial diversity at other less prestigious

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Law School's need for a critical mass of minority students is not based on a "belief that minority students always (or even consistently) express some characteristic minority viewpoint on any issue").

52. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003). Of course, viewpoint neutrality in fact would be contingent on existing diversity of viewpoints in the minority group—if, for example, ninety-five percent of the minority group hold a "progressive" viewpoint, then theoretical neutrality between progressive and conservative views would be a near-dead letter.

53. *See* cases cited *supra* note 41.

54. *Cf. Grutter*, 123 S. Ct. at 2350, 2354-56 (Thomas, J., concurring in part, dissenting in part) (arguing that Michigan does not have a compelling state interest in maintaining an elite law school); *id.* at 2348-49 (Scalia, J., concurring in part, dissenting in part). Justice Scalia explained:

> I find particularly unanswerable [Justice Thomas's] central point: that the allegedly 'compelling state interest' at issue here is not the incremental 'educational benefit' that emanates from fabled 'critical mass' of minority students, but rather Michigan's interest in maintaining a 'prestige' law school whose normal admissions standards disproportionately exclude blacks and other minorities.

Id.

schools in the state, the compelling state interest test should take account of the trade-off.

To be accurate, when a public university uses affirmative action to promote the exchange of ideas on campus, it does engage in a form of content-based, viewpoint discrimination, in tension with the doctrines of public fora and the state as subsidizer of speech. That is to say, the university is making a judgment that ideas shaped by minority racial experiences have an especially high value in the campus exchange of ideas, as compared to, say, ideas influenced by religious, socioeconomic, or ideological differences. The transmission of such ideas should accordingly be subsidized by race-conscious admission policies. This is where the Court's insistence on deference to the "Law School's educational judgment that diversity is essential to its educational mission"[55] appears to lean very heavily on the discretion of the state as educator—with respect to a university's threshold determination that racial diversity should be privileged over other sorts of diversity in campus discourse.[56] It follows naturally that a school—for instance a historically black college—might within its discretion choose not to privilege racial diversity at all, if based on a good-faith judgment that a diverse student body was not essential to its educational mission, even though other schools think it a compelling interest.[57]

II.

I have sought so far to describe a universal, discourse-focused argument that universities as a class make about why the state's interest in a diverse student body is compelling. The "robust

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55. *Grutter*, 123 S. Ct. at 2329 (majority opinion).

56. Professor Abner Greene has made the same conclusion in the broader context of government speech and subsidies of speech in non-educational contexts. "Government both may and should promote contested conceptions of the good, through direct speech acts and through funding private speech with conditions attached." Abner S. Greene, *Government of the Good*, 53 Vand. L. Rev. 1, 68-69 (2000). While I can afford to remain agnostic on the generalized point (i.e., assuming away the crutch of educational institutional deference) for the purposes of this Essay, I find his argument compelling both as a lens for understanding the doctrine and as a normative, neo-Platonic conceptualization of the state's purpose.

57. *See Grutter*, 123 S. Ct. at 2350, 2358 (Thomas, J., concurring in part, dissenting in part) ("The majority grants deference to the Law School's assessment that diversity will, in fact, yield educational benefits. It follows, therefore, that an [historically black college's] assessment that racial homogeneity will yield educational benefits would similarly be given deference." (internal quotation marks and citations omitted)); *see also* Rudenstine, *supra* note 24, at 38 ("[I]nstitutions may choose on their own to take less account of race, ethnicity, and gender in admissions . . . ."). Another place where deference to the university (as educator) does special work concerns the actual numerical determination of the "critical mass of underrepresented minorities" necessary to achieve the compelling government interest in diversity, but that is more a question of narrow tailoring. *Compare Grutter*, 123 S. Ct. at 2342-44 (majority opinion), *with* Grutter, 123 S. Ct. at 2365-70 (Rehnquist, C.J., dissenting).

exchange of ideas" is the core of the university's mission. Student body diversity promotes campus exchange of ideas informed by race and, as a result, imparts an appreciation of racial diversity that will reverberate even after school through life at large. These "educational benefits" are documented by evidentiary studies.[58] Such benefits are central to a university's conceptualization of its educational mission, the pedagogical strategies it chooses to accomplish that mission, and, ultimately, its underlying First Amendment rights. Consequently, the university is entitled to deference in its decision to privilege race-inflected discourse over other types of idea exchange by deploying a race-conscious admissions policy.

One plausible post-educational discourse benefit of student body diversity, which Justice Powell mentioned in his *Bakke* opinion, was the exposure of future leaders to diverse discourse on campus. Quoting *Keyishian v. Board of Regents*,[59] he noted that "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection."[60] His implicit assumption was that a university education was necessary to attain a position of national leadership. Consequently, any discourse benefits delivered by a university education would be reflected in the attitudes and qualifications of the leadership class, *regardless of the racial make-up of that class*. That is to say, the discourse benefit to national leadership can, in theory and logic, be realized without actual leadership diversity. This second-order discourse benefit is very different from the concept of the leadership benefit which the Court adopted in *Grutter*.

The difference between discourse benefits to leadership arising from student body diversity and the concept of the direct leadership benefit might be made clearer by thinking of ideological diversity, which confers a similar sort of discourse benefit. Indubitably, an exposure to Karl Marx's philosophy of history at the university, including interaction with Marxist scholars and student organizations like the Spartacus League will benefit a student's understanding of various social, economic, and political issues. And that enhanced understanding may very well make students who achieve positions of national leadership after graduation better leaders. It is quite a different thing to say that ideological diversity requires that we have some Marxists in leadership positions that require university education as a qualification.

To reiterate this important point, Justice Powell's concept of the

58. *See* Grutter, 123 S. Ct. at 2340 (majority opinion).

59. 385 U.S. 589, 603 (1967).

60. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (internal quotation marks and citation omitted).

diversity benefit to leadership concerned the inculcation of a particular mindset—one of toleration of difference, and it can be found as much in a racial majority as in a racial minority. This diversity is of course not the same as the leadership diversity claim in *Grutter*, which depends on minority participation in leadership for satisfaction.

Justice Powell's exclusive focus on discourse benefits might be explained in part by the art of the possible: It may have been impossible in 1978 to conceive of robust leadership diversity of the sort that seems possible today. I would like to think as well that the difference might be attributed to Justice Powell's divergent vision of the diversity norm. He appears to have believed that making presumptions about race was wrong, whether the presumption was that minorities will behave toward minorities in a certain way if in positions of leadership,[61] or, more relevantly, that minorities in the general population would regard *minority* leaders, irrespective of their views on racial issues, more favorably than *majority* leaders with mindsets open to racial diversity. His fear of resultant tokenism was prescient, as witness the trend to ideologically conservative minority appointments to leadership positions, such as federal judicial appointments, which seemingly deploy the candidates' race to insulate ideological viewpoints that do not fairly represent the views of minorities at large. The distressing presupposition of such appointments would appear to be that minorities in the general population will blithely accept them as indicative of meaningful leadership diversity, without regard for the decisions that they will likely make as leaders on their behalf.

In *Grutter*, the Court endorsed a subtly, but importantly, different claim from Justice Powell's discourse benefits rationale. Diverse discourse on campus and its societal reverberations notwithstanding, student body diversity at a particular educational institution is sought to produce, and in fact produces, not just racial-majority leaders who are open to diverse perspectives, but actual and substantial racial diversity in the leadership ranks of important non-educational institutions.[62] As Justice Breyer put it during oral argument to counsel for petitioner Barbara Grutter:

> [A]mong other things that they tell us on the other side is that many people feel in the schools, the Universities, that the way—the only way to break this cycle [of minority impoverishment and under-schooling] is to have a leadership that is diverse . . . you have to train a diverse student body for law, for the military, for business, for all

61. *Cf. Bakke*, 438 U.S. at 310-11. Justice Powell rejected the view that black doctors would have a greater tendency to serve poorer communities. *Id.*

62. *Grutter*, 123 S. Ct. at 2325; *see also* Karst, *supra* note 19, at 67 ("The services' affirmative action aims to ensure the inclusion of minority officers in all levels of the officer corps, and thus to improve the services' performance.").

> the other positions in this country that will allow us to have a diverse leadership in a country that is diverse.[63]

The Court was clearly influenced by the military brief in this belief. The military amici convincingly defended the affirmative-action policies of the military service academies and ROTC programs—the truly unique context in which diverse undergraduate student bodies do automatically produce racial diversity in the leadership ranks of a nationally essential non-educational institution. And, as the Court noted, the military leaders argued that "based on their decades of experience, a highly qualified, racially diverse *officer corps* . . . is essential to the military's ability to fulfill its princip[al] mission to provide national security."[64]

The military brief was delivered, like a precision-guided munition, under circumstances certain to maximize its effect. *Grutter* was argued on April 1, 2003. That same day, poignantly, the very junior officers discussed in the abstract by the military brief were putting their lives at risk for their country in Iraq, with the outcome of the war much in doubt.[65] Americans did not feel safe even at home in the wake of the September 11 bombings and the persistent threat of more terrorist attacks. Unlike the civilian proponents of affirmative action in the case, these amici were of the warrior class, many politically conservative. Deference to the military was particularly likely given that the Court itself comprised men and women of limited familiarity with the twenty-first century military institution and specifically its professional officer corps.[66]

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63. Oral Argument Transcript, *Grutter* (No. 02-241), 2003 WL 1728613, at *13; *see also Grutter*, 123 S. Ct. at 2341 ("[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders."). The Court cited *Sweatt v. Painter*, 339 U.S. 629, 634 (1950), in support of this statement, *see Grutter*, 123 S. Ct. at 2341, but the passage quoted made the distinguishable point that law school is a "proving ground for legal learning and practice".

64. *Grutter*, 123 S. Ct. at 2340 (emphasis added) (quoting Military Brief, *supra* note 20, at *5).

65. *See* Rick Atkinson, *As Battle Escalates, Holy Site Is Turned Into a Stronghold*, Wash. Post, Apr. 1, 2003, at A1 ("The assault is proving problematic for the Army, which finds itself entangled in precisely the sort of urban combat that military planners hoped to avoid."); John F. Burns, *Warning of Doom, Edgy Iraqi Leaders Put on Brave Front,* N.Y. Times, Apr. 1, 2003, at A1 ("The Iraqi leadership put on a show of redoubled defiance today and promised American troops nothing but 'death in the desert,' [even as American forces advance towards Baghdad.]"); Josh Friedman, *Stocks Tumble on War, Economy Fears*, L.A. Times, Apr. 1, 2003, at C6.

66. Five Justices never served in the U.S. armed forces (Justice Scalia did attend St. Francis Xavier School in New York, which was a Catholic military high school at the time). Justice Breyer and Chief Justice Rehnquist were enlisted draftees, and Justice Kennedy was a California National Guardsman. Justice Stevens, who was commissioned out of a wartime officer-candidate program, had experience in the Second World War (as a naval cryptology officer) in a navy that was very different from the U.S. naval service of today. Nor did any of the Justices have law clerks that term who had served in the officer corps. (Interestingly, three of the thirty-five law clerks during the prior 2001 Term did serve as active-duty line officers during the

It is clear from the record and the majority opinion in *Grutter* that the military brief was, in the apt word of one esteemed commentator, a "showstopper."[67] The Court quoted extensively from the military brief in its analysis of the compelling interest in student body diversity.[68] During the oral argument in *Grutter*, the Justices referred repeatedly to the military brief,[69] at one point referring to it as "Carter Phillips's brief," despite the fact that Mr. Phillips, a former law clerk to Chief Justice Warren Burger and counsel of record on the military amicus brief, was not himself allotted any argument time, to the apparent perplexity of those who were.[70]

The military brief's argument was clear and simple. It is important to have a racially diverse student body at selective military academies and ROTC programs because students are commissioned as junior officers, the front-line leaders of the armed forces, on the day they graduate.[71] Our enlisted ranks have many minorities (including 21.7% African-Americans, 9.6% Hispanic, 1.2% Native Americans),[72] and it

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1990s: a naval aviator, a naval cryptology officer, and a marine communications officer.)

67. James M. O'Neill, *Supreme Court Experts Say Affirmative Action Looks Safe, Justices Focus on Military Briefs,* Colum. Chron., Apr. 14, 2003 (quoting Columbia Law Professor Samuel Issacharoff who called the military brief "a showstopper" that "impressed on the court the significance not only of the legal principles at stake but the broader social impact of a poorly thought-out decision."), *available at* http://www.ccchronicle.com/back/2003-04-14/campus10.html; *see* Charles Lane, *Affirmative Action for Diversity is Upheld: In 5 to 4 Vote, Justices Approve U-Mich. Law School Plan*, Wash. Post, June 24, 2003, at A1; James M. O'Neill, *Court Upholds Use of Race in Admissions: Mich. Point System, Viewed as a Quota, Is Struck Down*, Phila. Inquirer, June 24, 2003, at A1 ("[L]egal experts said that the military brief was a masterful stroke . . . ."); David G. Savage, *Court Affirms Use of Race in University Admissions*, L.A. Times, June 24, 2003, at A1.

68. *Grutter*, 123 S. Ct. at 2340.

69. *See, e.g.*, Oral Argument Transcript, *Grutter* (No. 02-241), 2003 WL 1728613, at *7 ("Mr. Kolbo, may I call your attention . . . to the brief that was filed on behalf of some retired military officers who said that to have an officer corps that includes minority members in any number, there is no way to do it other than to give not an overriding preference, but a plus for race." (Justice Ginsburg to Mr. Kolbo, on behalf of petitioner Barbara Grutter)); *id.* at *9-*10 ("[T]he question is whether without the—the weighting of race that they do in fact give, they can have an adequate number of minorities in the academies to furnish ultimately a reasonable number of minorities in the officer corps, that's the issue, isn't it?" (Justice Stevens to Mr. Kolbo)); *id.* at *12 ("Well, let me ask you this, it's about the military brief that you didn't come here to argue about, but it will maybe get you back to your case." (Justice Kennedy to Mr. Kolbo)). Indeed, well over half of Mr. Kolbo's argument time, *id.* at *7-*17, of 15 total pages, was taken up by questions regarding the military brief.

70. *Id. at* *19. The oral argument proceeded as follows: "General Olson, just let me get a question out and you answer it at your convenience. I'd like you to comment on Carter Phillips's brief. What is your view of the strength of that argument?" Oral Argument Transcript, *Grutter* (No. 02-241), 2003 WL 1728613, at *19 (Justice Ginsburg to Solicitor General Theodore Olson after the words "First, it is"). General Olson's initial response was: "Well, I'm not sure." *Id.*

71. Military Brief, *supra* note 20, at *12-*13.

72. *Id.*

is necessary for good order and discipline that they see highly qualified officers of color in positions of leadership.[73] We know this is true based on evidence from the troubled history of race and the military institution in this country,[74] and, in any event, second-guessing the military's own prediction for what is necessary to perform its mission poses an unacceptable risk to our national security in perilous times.[75]

The brief continued: "It requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective. Like our military security, our economic security and international competitiveness depend upon it."[76] The Court accepted this "small step" without question;[77] my basic point here is to question it.

A useful starting point to understanding the difference between why the military seeks student body diversity and why its civilian counterparts do is to compare what each sort of institution asserts as its educational mission. West Point's mission is:

> [t]o educate, train, and inspire the Corps of Cadets so that each graduate is a commissioned leader of character committed to the values of Duty, Honor, Country; professional growth throughout a career as an officer in the United States Army; and a lifetime of selfless service to the nation.[78]

The Naval Academy seeks to give "young men and women the up-to-date academic and professional training needed to be effective naval and marine officers in their assignments after graduation."[79] It seeks a few good men and women with a certain mentality and ambition: "If you have a strong will to achieve, desire a real challenge, and want to be a leader serving your country, the opportunity of a lifetime could begin for you at the United States Naval Academy."[80] Similarly, the Air Force Academy aims high to "[i]nspire and develop outstanding young men and women to become Air Force officers with knowledge, character and discipline; motivated to lead the world's greatest aerospace-force in service to the nation."[81]

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73. *Id.* at *14-*17.

74. *Id.*

75. *Id.* at *17-*18, *29.

76. *Id.* at *29-*30.

77. Grutter v. Bollinger, 123 S. Ct. 2325, 2340 (2003) ("We agree that '[i]t requires only a small step from this analysis to conclude that our country's other most selective institutions must remain both diverse and selective.'" (internal citations omitted))

78. United States Military Academy Mission Statement, *available at* http://www.usma.edu/mission.asp (last visited Mar. 2, 2004).

79. United States Naval Academy Mission Statement, *available at* http://www.usna.edu/about.htm (last visited Mar. 2, 2004).

80. United States Naval Academy Admissions, *available at* http://www/usna/edu/Admissions/ (last visited Mar. 2, 2004).

81. United States Air Force Academy Mission Statement, *available at* http://www.usafa.af.mil/misvis/ (last visited Mar. 2, 2004).

Compare those statements with representative samples from three highly selective civilian colleges with similar acceptance rates to the military academies.[82] In line with their more generalist and intellectual approach, none of these civilian institutions have articulated a "mission" per se. A former president of Williams College described its institutional purpose thusly:

> The most versatile, the most durable, in an ultimate sense the most practical knowledge and intellectual resources which . . . can now be offered are those impractical arts and sciences around which the liberal arts education has long centered: the capacity to see and feel, to grasp, respond and act over a widening arc of experience; the disposition and ability to think, to question, to use knowledge to order an ever-extending range of reality; the elasticity to grow, to perceive more widely and more deeply, and perhaps to create; the understanding to decide where to stand and the will and tenacity to do so; the wit and wisdom, the humanity and the humor to try to see oneself, one's society, and one's world with open eyes, to live a life usefully, to help things in which one believes on their way. This is not the whole of a liberal arts education, but as I understand it, this range of goals is close to its core.[83]

And a former president of Williams's archrival Amherst once remarked:

> A university or a liberal arts college, quite apart from any religious affiliations, is pledged to a special faith of its own. It believes first that men and women can live together in a community where they teach and learn from each other . . . . A good college seeks not merely a coterie of the like-minded, to reinforce convictions already formed, but seeks out every vein of talent and opinion from every possible background, so that from the ferment of ideas freely exchanged it can advance to new conclusions.[84]

Brown University's website provides:

> The goal of the Brown Curriculum is for students to work toward a liberal education, in which students learn the knowledge and ways of thinking of a range of academic disciplines, in which they practice habits of self-reflection and empathy for others, and in which they

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82. The 2003 acceptance rates were: twelve percent for the United States Naval Academy, thirteen percent for the United States Military Academy, seventeen percent for the United States Air Force Academy, seventeen percent for Brown University, eighteen percent for Amherst College, and twenty-three percent for Williams College. US News & World Report, *America's Best Colleges 2004 Lowest Acceptance Rates*, *available at* http://www.usnews.com/usnews/edu/college/rankings/brief/webex/lowacc_brief.php (last visited Mar. 30, 2002).

83. Williams College Mission and Objectives (quoting President John E. Sawyer's 1961 Induction Address), *available at* http://www.williams.edu/admin-depts/registrar/geninfo/mission.html (last visited Mar. 2, 2004).

84. Amherst's Philosophy (quoting Peter R. Pouncey, President 1984-94), *available at* http://www.amherst.edu/aboutamh/ philosophy/ (last visited Mar. 2, 2004).

> are challenged to articulate and examine the moral convictions that will guide them through life.[85]

Nor, for that matter, can civilian undergraduate colleges, or indeed, any civilian institution of higher learning, assert the sort of robust causal claim that the military academies can—that diverse student bodies will necessarily cause leadership diversity in the target institution. The military service academies and officer training programs are unique gate-keeping institutions insofar as they are a sufficient condition[86] for direct entry into leadership of an important public institution—the officer corps of the nation's armed forces.[87] Indeed, in functional terms, the military academy case provides the rare circumstance in which a racially diverse student body *equals* a racially diverse leadership group in a nationally sensitive non-educational institution: Ninety-nine percent of graduates from the academies are commissioned as active-duty military officers.[88] It seems fair, therefore, to conclude that if the compelling government interest at issue is "obtaining the educational benefits of a diverse student body," one should include in the calculus for the national military academies the "benefit" of leadership diversity in the armed forces.

No civilian institution of higher learning, however prestigious, can claim to be a true gate-keeper in the sense of being a sufficient condition for entry into the leadership cadres of public or private non-

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85. Brown University, Statement of Dean of the College, *available at* http://www.brown.edu/Administration/Dean_of_the_College/DOC/s2_brown_curriculum/ (last visited Mar. 2, 2004).

86. They are not a necessary condition because officers may also be commissioned through ten-to-fourteen week post-undergraduate officer candidate schools and enlisted commissioning programs. In my experience as a naval officer, however, I perceived that minority officers who are commissioned out of the military service academies command a special respect from the enlisted ranks because academy graduates have traditionally formed the backbone of the professional officer corps. It is, in this sense, a particularly poignant statement about the fairness, openness, and legitimacy of leadership access for enlisted to see minority officers commissioned out of the highly selective service academies.

87. As a mark of their importance to the nation, all commissioned officers have their commissions signed by the President of the United States. *See* U.S. Const. art. II, § 3 (authorizing that the President "shall Commission all the Officers of the United States"). Moreover, many military academy graduates put their training to use to become civilian leaders in industry and government after completing their service obligations, which augments the academies' claim to general national leadership benefits.

88. The service academies permit cadets and midshipmen to resign after the second year without incurring an active-duty service obligation. Officer candidates in ROTC programs can resign after their first year without incurring a service obligation. Those who drop out after that point must serve an enlisted tour or risk prosecution, unless it is determined that there was a compelling reason in which case authorities may permit repayment of scholarship monies with interest. All who graduate are commissioned as officers and serve some active duty, absent a medical or other exception rarely granted.

educational institutions of the sort that the Court mentioned in *Grutter*—state governorships,[89] the United States Congress,[90] the federal judiciary,[91] and "major American businesses."[92] There is no such thing as a State Governors' School, a U.S. Congress academy, a federal judge academy, or a corporate chief executive officer ("CEO") academy,[93] to which anyone with qualifications can apply and acceptance to which guarantees a gubernatorial mansion, a Senate or House seat, a federal judgeship, or a CEO job upon graduation.[94]

Of course, certain professional and graduate schools, notably the selective law schools and business schools, do seek to groom institutional and professional leaders, and can also empirically claim disproportionate access by graduates to prominent non-educational institutions that would perform better with racial diversity in their leadership ranks. The Court pointed out that "[i]ndividuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives."[95] The Court continued that "[t]he pattern is even more striking when it comes to highly selective law schools. A handful of these schools account for 25

89. *See* Grutter v. Bollinger, 123 S. Ct. 2325, 2341 (2003).

90. *Id.*

91. *Id.*

92. *Id.* at 2340. To be fair, junior military officers, which is what the academies and ROTC programs are principally preparing their graduates to be (with training for command billets provided by war colleges and the like), are not really national-level leaders like Senators, governors, Article III federal judges, and major CEOs. Rather, junior officers are unique in that they are community-level leaders of a nationally essential institution. But the Court neglected to develop this point, analogizing instead to national-level civilian leaders. If the military analogy is to have full play, integration below the pinnacle of national leadership at the community level might also be a compelling interest. Speculation in that direction is beyond the scope of this Essay, the intent of which is to add some precision and rigor to the legal analysis explicitly articulated by the Court in *Grutter*, in the hope of guiding future discussion.

93. Many leading business schools have "advanced management programs" that provide short-term (e.g., three-week) training programs for senior private and public executives. The role of such programs, however, is not to impart essential professional training, but rather to facilitate networking and familiarization with academic scholarship on useful subjects of currency and interest. They are, in this sense, more like social "finishing schools" than true gate-keeping institutions.

94. The FBI Academy and state police academies are similar to the military academies in terms of sufficiency for entrance into an institution benefited by racial diversity in composition, but they are not undergraduate, graduate, or professional schools in the common sense. Nor are they the sort of nationally prominent institutions the Court seems to have had in mind when talking about leadership diversity. The analysis of affirmative action in those contexts, then, should turn on a direct analysis of diversity as a compelling interest in the non-educational institution—the FBI or the state police as appropriate—without couching it in terms of the gate-keeping "educational" institution. *Cf.* Washington v. Davis, 426 U.S. 229 (1976).

95. *Grutter*, 123 S. Ct. at 2341.

of the 100 United States Senators, 74 United States courts of appeals judges, and nearly 200 of the more than 600 United States district court judges."[96] Modesty likely prevented the Court from observing that the same "handful" accounted for all nine of its Members.[97] We might add that ten more state governors have advanced degrees (including five MBAs);[98] thirty more Senators have JD's from law schools other than the "handful" the Court had in mind and at least twenty-two others have advanced degrees (including six MBA's and one medical degree ("MD")).[99] And at least sixty-three of the CEOs of the top 100 companies in the Forbes 500 have some sort of advanced degree (twenty-five MBA's; nine JDs; one MD).[100]

Indeed, a law degree is a prerequisite to become a federal or state judge, prosecutor, or defense lawyer—legal sub-institutions in which racial diversity would seem to be highly desired given the disproportionate numbers of minorities who are victims, perpetrators, and litigants in the American justice system. Consequently, the Court in *Grutter* was correct, in my view, to have factored the educational benefit of leadership diversity in its compelling-interest analysis as to the University of Michigan Law School[101] (albeit in a weaker form than in the military-academy context). The Court's implicit acceptance of the same conclusion as to the University's college,[102] however, is a different matter.

In today's America, bachelor's degrees, even from the most elite colleges, no longer command a leadership gate-keeping role, in large part because graduate and professional degrees have become so common.[103] While there are 1,995 schools that confer undergraduate degrees, there are presently an astonishing 1,499 educational

96. *Id.*

97. Among the nine Justices: Justices Scalia, Kennedy, Souter, and Breyer were graduates of Harvard Law School; Chief Justice Rehnquist and Justice O'Connor were graduates of Stanford Law School; and Justice Stevens received his law degree from Northwestern, Justice Thomas from Yale, and Justice Ginsburg from Columbia.

98. Governors of the United States Biographical Information, *available at* http://www.nga.org/governors/ (last visited Mar. 2, 2004).

99. Senators of the United States Biographical Information, *available at* http://www.sentate.gov/general/contact_information/senators_cfm.cfm (last visited Mar. 3, 2004).

100. For the Forbes 500 companies, see Forbes 500 List (Mar. 28, 2003), *available at* http://www.forbes.com/lists/. For the educational background of CEOs, see Standard & Poor's Biographical Register, *available at* http://web.westlaw.com/welcom/company_information/.

101. *See Grutter*, 123 S. Ct. at 2341.

102. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2426-27 (2003).

103. Empirical research might illuminate the validity of this conclusion. For instance, one might design a multivariate regression model to assess the causal effect of a degree from a selective undergraduate college as compared to other variables such as graduate education and institution, socio-economic background, work experience and so forth. My guess would be that such analysis might reveal a statistically significant coefficient for a very small class of super-elite colleges, such as Harvard, Yale, Princeton, and Stanford.

institutions that confer master's degrees too, 535 of which also grant doctorates,[104] and, on top of that, 188 law schools accredited by the American Bar Association.[105] According to 2000 U.S. census data, 28,317,792 of the nation's population twenty-five years and over have a bachelor's degree only; 16,144,813 have an additional advanced degree.[106] A former president of Harvard University and noted education-policy expert summed it up nicely:

> An excellent undergraduate education is an enormous advantage in life. But we know that a college degree, by itself, is increasingly seen as inadequate preparation for many careers for which it once sufficed. Graduate training has long been necessary for aspiring doctors, lawyers, educators, scholars, research scientists, and clergy; in today's world, advanced degrees are also seen as highly desirable, if not essential, for many other callings, including leadership positions in business, public affairs, and the not-for-profit sector.[107]

Nor is specialized job training, even in a leadership capacity—to be a military officer, a corporate executive, a judge, a politician, or even a non-profit administrator—a principal mission of the typical elite undergraduate institution. (I discuss in Part III, *infra*, a non-specific leadership production function that top colleges do claim—that they mold leaders of the nation in a general way.) Unlike the military academies, top civilian colleges do not require students to take classes in leadership, leadership ethics, small-team tactical leadership, or great military and political leaders of the past. The vast majority of elite colleges, in the liberal arts tradition, do not supply this sort of vocational training in how to be a leader so common to the military classroom, as they are more concerned with teaching students how to think critically in a generalist way, with one's "major" more a matter of emphasis than specialization.[108] Of course elite colleges—indeed all undergraduate programs—encourage participation and leadership in student organizations and sports teams,[109] but such activities are understood to be extracurricular, that is to say, voluntary and unrelated to what is taught and expected to be learned in satisfaction of degree requirements.

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104. Fall Enrollment, 1999 Survey, *available at* http://nces.ed.gov//programs/digest/d01/dt210.asp.

105. Number of Law Schools, *available at* http://www.abanet.org/legaled/approvedlawschools/approved.html (last visited Mar. 3, 2004).

106. 2000 U.S. Census, *available at* http://factfinder.census/gov/servlet/Basicfactsservlet/.

107. *See* Bowen & Bok, *supra* note 14, at 91.

108. *See supra* notes 83-85 and accompanying text.

109. *See* Don Oldenburg, *Tippy-Top Secret: Yalies Bush and Kerry Share a Patrician Past of Skull and Bones*, Wash. Post, Apr. 4, 2004, at D1 (Yale President Richard Levin often "referred to Yale as 'a laboratory for leadership.' Aside from the university's acclaimed academic life, Yale provides undergrads a wealth of opportunities to lead. Registered on campus are 250 student organizations.").

As a final attempt to understand the difference between leadership and discourse benefits, it may be helpful to engage in a counterfactual thought experiment. If the military academies were to allow cadets and midshipmen to participate in every aspect of academy life yet opt for civilian jobs upon graduation, and most of the minority students underrepresented in the officer corps were to choose civilian life, then student body diversity would produce robust discourse benefits without leadership benefits. Conversely, if selective civilian schools allowed underrepresented minorities to enroll exclusively in courses with overwhelming minority populations, to reside in racially concentrated housing, to participate exclusively in minority-centric extracurricular activities, and informally to avoid even casual interaction with non-minorities on campus, and a large proportion of underrepresented minorities in fact chose to segregate themselves in these ways, then there would be negligible discourse benefits to student body diversity.[110] But the satisfaction of an interest gauged by racial diversity in the numbers of graduates assuming leadership positions in nationally prominent non-educational institutions would be unaffected.

III.

Let us return to the doctrinal clarification of the diversity test I offered at the beginning of this Essay. A compelling state interest in student body diversity exists when the higher educational unit (1) has identified the "educational benefits" diversity is "designed to produce" and shows (2) that attaining those benefits is "essential to its educational mission," and (3) that student body diversity does in fact produce those mission-essential benefits.[111] With respect to discourse benefits, the test seems at first easily satisfied: "the robust exchange of ideas" is at the core of a university's (in the ideal, universal sense) educational mission and such discourse produces documented educational benefits on campus and beyond.

It should be evident that certain kinds of educational units can

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110. *Cf.* Grutter v. Bollinger, 123 S. Ct. 2325, 2348, 2349-50 (2003) (Scalia, J., concurring in part, dissenting in part). Justice Scalia explained:

> Still other suits may challenge the bona fides of the institution's expressed commitment to the educational benefits of diversity .... [T]empting targets, one would suppose, will be those universities that talk the talk of multiculturalism and racial diversity in the courts but walk the walk of tribalism and racial segregation on their campuses—through minority-only student organizations, separate minority housing opportunities, separate minority student centers, even separate minority-only graduation ceremonies.

Id. at 2349-50. A possible rejoinder to Justice Scalia is that even if such self-segregation were to result, the phenomenon itself would promote potentially beneficial discourse on the subject of racial interaction on campus.

111. *See supra* notes 8-10 and accompanying text.

make a better claim to discourse benefits than others because their educational mission is more closely associated with the exchange of ideas in which differing racial perspectives would be relevant. For example, the curricula at liberal arts colleges, law schools, public-policy schools, business-management schools, or graduate departments in sociology and comparative literature, deal with issues and subject matter to which different racial experiences are deeply relevant. By contrast, undergraduate engineering schools, military academies, graduate programs in theoretical physics or mathematics, and medical schools are not so focused on subjects usefully illuminated by racial inflections. As Justice Powell put it in *Bakke*: "It may be argued that there is greater force to these views [in the interest of student body diversity] at the undergraduate level than in a medical school where the training is centered primarily on professional competency."[112]

Of course, that is not to say that a school in the latter category can make no claim whatsoever to seeking and conferring the discourse benefits of a diverse student body. No educational institution, not even a military academy, which is simultaneously an educational and a military installation,[113] says that its mission does not value the discourse benefits of student body diversity at all.[114] As Justice Powell observed with respect to medical schools:

> Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background—whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its

112. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978).

113. As such, the military service academy occupies an interesting intersection between the civilian university institution and its robust First Amendment rights, *see supra* Part I, and the military base, where national security trumps most First Amendment rights, *see, e.g.*, Greer v. Spock, 424 U.S. 828, 838 (1976) ("The notion that federal military reservations, like municipal streets and parks, have traditionally served as a place for free public assembly and communication of thoughts by private citizens is thus historically and constitutionally false."); *id.* at 843 (Powell, J., concurring) ("[The] enclave of a [military] system . . . stands apart from and outside of many of the rules that govern ordinary civilian life in our country.").

114. *See, e.g.*, Overview of the Academy, *available at* http://www.usma.edu/admissions/overview.asp (last visited Mar. 2, 2004). The overview explains:

> Each year the United States Military Academy admits 1,150 to 1,200 young men and women. These new members of the cadet corps come from all corners of the United States and represent nearly every race, religion and culture in the country. Nurtured by the West Point environment, this diversity of background helps cadets gain a cultural as well as a rich educational experience.

Id.

> graduates to render with understanding their vital service to humanity.[115]

Likewise, the experiences and views of minority cadets and midshipmen, while not so important in close-order drill, naval propulsion systems class, or celestial navigation, are certainly valuable in academy and ROTC classes on leadership, ethics, politics, and history. Furthermore, there is always interaction on campus outside of the classroom, say, at the dormitory, or through sports or other extracurricular activities. All of this, however, is consistent with my point: depending on the nature of a specific educational institution, there is variation in the degree to which student body diversity is sought to produce, and in fact produces, discourse benefits.

Determining the leadership diversity benefits of a diverse student body at different sorts of institutions is more complicated in certain respects and easier in others. It would be easier, as we have seen, if we look to institutional articulations of mission and apply a strict causal test, limiting the claim to leadership benefits to educational units that assert diverse student bodies as a necessary (like law schools) or a sufficient (like military academies) cause of racially diverse leadership in nationally sensitive non-educational institutions. One self-evident additional element of the benefits test in the leadership context would be the requirement of postulating a compelling need for racial diversity in the leadership of the target non-educational institution or profession.

A successful claim under this "strict" test would be something like the following: The mission of the military academies is to train officers. Military academy cadets and midshipmen automatically become officers upon graduation. A diverse officer corps is a compelling need for the military to perform its nationally sensitive mission.

Or, the mission of law schools is to train lawyers, who form the exclusive pool of those who may become federal judges. Law school students become lawyers upon graduation (when they pass the bar). There is a compelling need for a diverse federal judiciary given the diverse social context in which legal issues arise.

A closer call under a strict test would be the sort of claim that business schools might make. A principal mission of the business school is to train corporate managers. If we are to have a racially diverse corporate leadership, we must have racially diverse student bodies at selective business schools. It is nationally important to have racially diverse corporate leadership because many corporate workers are minorities and because the global business environment is a multi-racial one.

A closer case yet might be medical schools. Medical doctors must

115. *Bakke*, 438 U.S. at 314.

graduate from medical school. Diverse student bodies are therefore necessary for a racially diverse medical profession, but is a diverse medical profession a compelling national need? Perhaps so, because medical treatment is as much about social understanding and wisdom as it is about science.

To be fair, one could imagine a more general form of "strict" test for the twenty percent of the nation's top colleges that use affirmative action, even given the increasing importance of subsequent graduate or professional education to becoming a member of the nation's leadership cadre. A principal mission of selective colleges like the members of the Ivy League is to "mold" leaders of society at large in a general way.[116] If we are to have racial diversity in the leadership of the nation, we must have racial diversity in the Ivy League.

The crucial difference between this articulation and the others is the inability of the civilian college educational unit to make a more precise claim of leadership mission and effect, that a diverse student body will lead to diversity in the leadership of a specific institution or profession in which there is a compelling need for racial diversity. The claim of an elite college to a leadership-production function may have an undeniable commonsense appeal, and it may be causally accurate, albeit in a weak sense.[117] But this sort of generalized, open-ended claim to *prospective* social benefit, like its *retrospective* remedy counterpart—the interest in remedying "societal" as opposed to institutional discrimination, which was held to be unconstitutional in *Wygant v. Jackson Board of Education*[118]—is simply too protean to merit incorporation in a substantive legal test, particularly one that is meant to be as exacting as the compelling interest standard. If an argument for student body diversity is decisive on the basis of an assertion of prospective general societal benefit, it is hard to see the conditions under which that argument might fail.

To sum up, then, different institutions of higher learning seek and confer the educational benefits of student body diversity to varying degrees. Military academies seek diverse students for a diverse officer corps and in fact produce it, but they are not so much interested in discourse benefits although obtaining such benefits is part of their

116. *See, e.g.*, Oldenburg, *supra* note 109 ("For more than three centuries, Yale has seen its job as educating future leaders–from the fourteen Yalies who served on the Continental Congress and four signers of the Declaration of Independence to four of the past six U.S. presidents (the two Bushes; Bill Clinton, Yale Law '67; and Gerald Ford, Yale Law '41."). It is interesting to point out that of the modern Yalies who have become president in recent times, two were products of its law school, and George W. Bush was also a graduate of Harvard Business School, a top professional school. Moreover, George H.W. Bush was a 1948 graduate of Yale College—a member of a generation of leaders for whom graduate and professional education was not as important as it is in the twenty-first century.

117. *See supra* note 103.

118. 476 U.S. 267, 276 (1986). The *Grutter* Court did not purport to disavow *Wygant*.

mission. Law schools strongly seek and produce both the discourse and institutional leadership benefits of a diverse student body; business schools do so as well, although possibly less so on both dimensions. Medical schools make the weakest argument of the professional schools to both institutional leadership and discourse benefits, but they can field arguments on both fronts nonetheless. Colleges can make the strongest claim to discourse benefits, but no real claim to institutional or professional leadership benefits on a national level.

Should those discourse benefits be enough to find a compelling state interest in student body diversity at the few selective public and private colleges that use affirmative action? The Court in *Gratz* assumed so,[119] and Justice Powell in *Bakke* said so,[120] but neither considered the broader context of the enterprise of higher education in the United States. The most salient aspects of higher education in America today are the accelerating proliferation of graduate and professional schools that are the gate-keepers to leadership in our increasingly specialized society, and the fact that there are many more non-selective colleges which as a group lose highly qualified minority candidates to the select group of prestigious undergraduate schools.

CONCLUSION

"Diversity," understood in the normative sense as an associative virtue,[121] is the paradoxical celebration of difference under the common and equal condition of humanity. Racial or ethnic diversity is the celebration of difference in race or ethnic origin among human beings. It is a relative newcomer to the American canon of values,[122]

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119. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2426-27 (2003).

120. *See Bakke*, 438 U.S. at 311-15.

121. I call "diversity" an associative virtue because it is a good achieved only in the context of mutual interaction, like "friendship" by contrast to virtues like "self-mastery" which are personally realized though in a social or political context. That is not to say that diversity as an associative value does not have its analogue in strictly personal virtues, such as the idea of human dividedness at the root of Isaiah Berlin's thought.

122. The first chief justice of the Supreme Court was one of many founders who believed that homogeneity, and not diversity, was the desired norm:

> Providence has been pleased to give this one connected country, to one united people, a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs. . . . This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous and alien sovereignties.

The Federalist No. 2, at 9 (John Jay) (Jacob E. Cooke ed., 1961). Early twentieth-century American immigration statutes, which established quotas on immigration by national origin that discriminated most against Asian immigrants, reflected to some

coincident with the post-Second World War, post-colonial acceptance of racial diversity as an inalterable yet benign (i.e., consistent with fundamental equality) fact of the human condition and qualified rejection of its antinomy, racial homogeneity, as a normatively compelling form of social ordering.[123]

The sense of diversity as a virtue has special importance for a multi-racial nation. All nations, whether racially heterogeneous or homogeneous, must deal with the *external* descriptive condition of racial diversity in the world community at large, but a multi-racial nation must confront it as an issue of *internal* governance.[124] The issue takes on particular salience when racial differences correlate to inequalities of socioeconomic wealth and political power, and it is even more urgent when the dynamics of population growth are such that have-not races are reproducing at greater rates than the haves. Uncorrected, race-correlated material inequities might lead to social instability and national decline. Skillfully managed, the condition of stable internal racial diversity should also give the multi-racial nation a comparative advantage over non-diverse nations in its external relations with a diverse yet increasingly intertwined world.

Our institutions of higher learning, as a class, occupy a special place in the potential for realization of racial diversity (in its normative sense) for two related reasons. They are a principal means by which citizens are taught social values such as the virtue of racial diversity. These are the discourse benefits I have talked about, and they have to do with how all citizens, regardless of race, view society and life. Our universities are also an important training ground for the leaders of a racially diverse society in which higher education is a virtual necessity for significant socioeconomic and political advancement. This gate-keeping function means that for the nation to have the benefit of leadership diversity, it must have minorities at its universities. It follows as a logical matter that racial diversity among student populations at our colleges and universities is potentially a compelling government interest, to ensure representation both of minority

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extent the resilience of the countervailing norm of racial homogeneity. The national-origin system continued to be a prominent feature of the 1952 Immigration and Naturalization Act, and was only abolished in 1965. Similarly, state-sponsored segregation enforced a de facto hierarchical accommodation of racial diversity that is inconsistent with the fundamental human equality across races that is a premise of the present multi-racial diversity norm.

123. I say "qualified," because racial or ethnic group self-determination may be the only option in the context of states with intractable histories of inter-ethnic tension. But no mainstream American leader, whether progressive or conservative, contends that a return to racial homogeneity is the answer to multi-racialism in the present United States population. Even for the fringe segregationist, the solution would presumably be the hierarchical bifurcation of society by apartheid, not expulsion or eradication of heterogeneous races.

124. *See* Susan Sturm & Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, 1024-25 (1996).

viewpoints and experiences on campus and of racial minorities in our leadership elites upon graduation. The very best schools say that they must have race-based admissions policies to enroll the highly qualified minority applicants necessary to achieve the compelling interest in racially diverse student bodies.

In fact, these same elite educational institutions have marked differences in mission and emphasis, owing to the many needs of the society they serve and the corresponding scale of the higher educational enterprise as a whole. The highly selective military academies, for example, seek student body diversity more for the sake of leadership diversity in the nation's armed forces than for the benefit of a robust exchange on campus of ideas formed by racially diverse experiences, which is the principal aim of the selective undergraduate schools that are their civilian counterpart. While selective civilian undergraduate institutions may convincingly claim that they seek student body diversity to produce the campus and societal benefits of diverse discourse, and that courts should defer to their educational judgment that these benefits are compelling, they are not so clearly entitled to claim that they consciously seek to train institutional and professional leaders on a national level—military officers, judges, politicians, and corporate executives.

Nor can elite colleges claim that undergraduate student body diversity *causes* the benefit of institutional and professional leadership diversity in anything other than a very general, hence legally suspect, way. Not only is such specialized training in tension with the fundamental mission of the liberal arts college institution, the individuals or electorates who govern access to leadership in nationally sensitive institutions like the federal judiciary, the Senate, and corporate boardrooms, (the nation's officer corps being the unique and important exception), may promote racial diversity on their own without regard to whether a person went to an elite college. More important for our purposes, it is increasingly the case that those who seek leadership positions in institutions of national importance must obtain further, specialized training at graduate and professional schools that have, as a class, the narrow educational mission of leadership and professional diversity.

Yet even in terms of the admittedly important benefit of diverse discourse, the case for a compelling state interest in student body diversity at elite colleges is problematic, notwithstanding the Court's summary acquiescence on the point in *Gratz*.[125] The self-interested argument of the few selective public and private undergraduate schools that employ affirmative action is that without it, they must reject highly qualified minority applicants at the cost of meaningful student body diversity on their campuses. This means that with

125. *See* Gratz v. Bollinger, 123 S. Ct. 2411, 2426-27 (2003).

affirmative action at the elite colleges, those less selective colleges (among the remaining eighty percent of all colleges) with very few minority students have no chance to enroll these same highly qualified minority candidates, at the expense of their own presumptively compelling interests in student body diversity. And even those less selective undergraduate programs with sufficiently diverse student populations as it is will suffer a *qualitative* loss in their campus discourse because of the flight of *highly qualified* minority students to elite colleges engineered by affirmative action.[126] It might not be fair to require a private college with government funding to answer for the costs of this tradeoff between the elite and non-elite colleges in compelling government interest analysis, but surely, a state with a portfolio of public institutions of higher learning ought not to be afforded the same latitude.[127] And if the benefit of diverse discourse at elite public colleges alone does not suffice as a compelling state interest, it seems necessary to reach the same legal conclusion for their private counterparts, to preempt the latter from cherry-picking all highly qualified minority college students.

Is it better, then, to allow affirmative action at our most prestigious colleges so that they may each achieve robust student body diversity, or to dilute the concentration of highly qualified minority candidates at elite colleges, sharing them with less prestigious schools and doing away with affirmative action altogether at the undergraduate level? This seems to me a very hard question. On the one hand, to the extent that the causal claim of elite colleges to leadership diversity is right,[128] the latter choice would diminish the direct representation of racial minorities in the leadership of nationally sensitive institutions and, also, would lessen the exposure to undergraduate-campus

126. My point here necessarily presumes that minority students who are "highly qualified" in an academic sense make a greater contribution to discourse benefits than less qualified students. Concededly, this need not be true, because less qualified minority students might have more diverse life experiences to share with majority students on campus. However, to the extent highly qualified students might have better oral and written communications skills, they may be more adept at discourse, notwithstanding the comparative homogeneity of their experiences. In any event, the connection between high qualifications and desired discourse benefits is an implicit presumption of race-conscious admissions policies at elite universities, which do not purport to give preferences, *ceteris paribus*, to merely qualified minority students.

127. I would think that how this plays out in practice is complicated, because a State might reasonably choose to invest in a nationally prominent "flagship" university, including its undergraduate arms, as opposed to its other state institutions of higher learning. That logic is somewhat undermined to the extent a national reputation is made by the research and scholarship conducted by the faculty and students of a public university's graduate and professional schools, which could continue to employ affirmative action. Indeed, those graduate and professional programs might be benefited by greater parity in state colleges and undergraduate programs, which could serve as in-state feeder institutions to those programs.

128. *See supra* note 103.

diversity of white and other students not benefited by affirmative action who later become such leaders.

On the other hand, to the extent that graduate and professional schools have displaced selective colleges as the crucial gate-keeping educational units for leadership diversity (again, with the exception of the military academies and ROTC for the military officer corps), getting rid of undergraduate affirmative action while keeping it at the graduate level would have little effect on leadership diversity but considerable salutary effect for the national educational enterprise as a whole. For one, it would give less prestigious colleges a better chance to attract highly qualified minority candidates to shore up their own compelling interest in student body diversity for its discourse benefits. Such a two-tiered system would also encourage the top graduate and professional schools to look for minority applicants from a more diverse universe of undergraduate institutions, for example, historically black institutions like Hampton University, or less prestigious public schools with large populations of under-represented minority students like Virginia Commonwealth University[129] and private such schools like Temple University.[130] And in so doing, elite graduate and professional schools might develop a familiarity with these undergraduate programs that would increase the chances of outstanding non-minority graduates to get in. The end result would be greater diversity in the undergraduate backgrounds of minority and non-minority students at the very best graduate and professional schools[131]—the new gate-keepers to leadership diversity, an important corollary of which would be elimination of the "double-counting" effect of affirmative action, i.e., the cultivation of a super-elite of minority students benefiting from affirmative action twice by being accepted at an elite college and again at a top graduate or professional school.[132]

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129. Virginia Commonwealth University Freshman Profile (reporting that twenty percent of incoming freshmen in 2003 are African-American), *available at* http://www.vcu.edu/ugrad/admissions101/freshmn_profile.html (last visited Mar. 2, 2004).

130. Temple University Fall 2002 Student Profile (reporting that nineteen percent of incoming freshmen in 2002 were African-American), *available at* http://www.temple.edu/factbook/profile02/profile.html (last visited Mar. 2, 2004).

131. And to the extent this means that more minority students who attended historically black colleges or less prestigious undergraduate schools with different sorts of student populations attend graduate and professional schools, it would increase the quality of diverse discourse on the campuses, since divergent undergraduate experiences are valuable life experiences in themselves.

132. A cursory examination suggests that the concentration of elite college graduates (presumably including many minority students for which no data is publicly available) at top graduate schools may be staggering. Harvard Law School, for instance, reported 1,669 full-time JD students enrolled in 2002-2003, with 268 undergraduate schools represented. *See* JD: Undergraduate Schools of J.D. Students Enrolled at HLS in 2002-2003, *available at* http://www.law.harvard.edu/admissions/jd/body.php. But an astonishing forty-six

The Court's lack of clarity about the diversity rationale illuminates just how difficult it is to operate an important social value like "diversity" into a workable legal rule that can in turn be applied to a vast, shifting social institutional landscape while remaining faithful to the underlying value.[133] The difficulty is compounded by the powerful, seemingly countervailing norm of formal racial equality, guarded by its own formidable doctrine, the Equal Protection Clause. It is no wonder, then, that the Court, inspired by the virtues of diversity and the specific value of student body diversity lauded by forces as disparate as university dons and warrior chieftains, articulated a doctrine that does not quite fit the rich fabric of fact. This Essay has been an attempt to add some precision to the *Grutter* Court's diversity analysis, but, at bottom, its theme is unoriginal: "Context matters when reviewing race-based governmental action under the Equal Protection Clause."[134]

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percent of the student body (767 students) were graduated from eleven colleges: the eight Ivy League schools, Stanford, Duke, and Berkeley. Indeed, Harvard (189) and Yale (101) Colleges together accounted for more students (290) than 190 undergraduate schools *combined* (289). *See generally* Elizabeth Bernstein, *Want to Go to Harvard Law*, Wall St. J., Sept. 26, 2003, at W1 (ranking colleges in terms of their success in placing graduates at prestigious business, medical, and law schools, with Harvard, Yale, Princeton, Stanford, and Williams at the top of the rankings).

133. *But see* Karst, *supra* note 19, at 74 (noting that despite the uncertainty surrounding the decision, "it does offer a starting point for those who would be more race-conscious in their efforts to do racial justice, both in politics and in constitutional law").

134. Grutter v. Bollinger, 123 S. Ct. 2325, 2338 (2003) (citing Gomillion v. Lightfoot, 364 U.S. 339, 343-44 (1960) ("[I]n dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts.").

ARTICLE

"BOUND FAST AND BROUGHT UNDER THE YOKE": JOHN ADAMS AND THE REGULATION OF PRIVACY AT THE FOUNDING

*Alison L. LaCroix**

The announcement of the United States Supreme Court in 1965 that a right to privacy existed, and that it predated the Bill of Rights, launched a historical and legal quest to sound the origins and extent of the right that has continued to the present day.[1] Legal scholars quickly grasped hold of the new star in the constitutional firmament, producing countless books and articles examining the caselaw pedigree and the potential scope of this right to privacy. Historians, however, have for the most part shied away from tracing the origins of the right to privacy, perhaps hoping to avoid the ignominy of practicing "law-office history."[2] Instead, some historians have engaged in subtle searches for markers of privacy—such as an emphasis on family,[3] a notion of the home as an oasis,[4] or a minimal

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1. Griswold v. Connecticut, 381 U.S 479 (1965) (holding unconstitutional a state law prohibiting the use of contraceptives by married couples). Scholarly interest in the right to privacy originated in 1890, with the publication in the *Harvard Law Review* of Samuel Warren and Louis Brandeis's seminal article, *The Right to Privacy*. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 Harv. L. Rev. 193 (1890). Although Warren and Brandeis put forth a compelling argument for the long lineage of the right in English common law, privacy did not gain recognition as a fundamental right for another seventy-five years. After 1965, the right to privacy steadily expanded its ambit, extending governmental protection to abortion as well as other reproductive decisions. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (holding that a woman has a constitutional right to abortion); *cf.* Eisenstadt v. Baird, 405 U.S. 438 (1972) (striking down on equal protection grounds a state law prohibiting the use of contraceptives by unmarried persons).

2. The phrase "law-office history" refers to "the selection of [historical] data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered." Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 122 n.13.

3. *See, e.g.*, Edmund S. Morgan, The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England 173 (rev. ed. 1966) (describing New

degree of criminal prosecution[5]—as a means of understanding how Americans have viewed the various spheres of activity that have constituted their world. Rather than searching for the origins of a right to privacy, these scholars broaden the inquiry in an attempt to understand the nature of a realm of human activity that they characterize as "private," in contrast to a corresponding "public" realm.

Yet the very ambiguity surrounding these terms, with their immense resonance for modern American life, complicates the historiographical project. Does the use of privacy as an analytic tool compromise the historian's ability to separate the term's modern connotations from its historical ones? Can early uses of the words "private" and "privacy" ever be understood as the speakers meant them, or has the Supreme Court's pronouncement that a right to privacy has existed all along simply lulled us into believing that the meaning of these words remains unchanged, and that a stable notion of "privacy" has endured and been celebrated throughout American history? In short, the concept of privacy has not lent itself to easy historical application. Consequently, many historians seem to have abandoned privacy as both an analytical framework and a topic of analysis.

Nowhere is this reluctance to grapple with the myriad layers of privacy more marked than in the historiography of the nation's founding. The relative dearth of scholarly attention paid to notions of privacy in the 1770s and 1780s is startling; after all, the era that birthed the very Constitution that became the basis of a national valorization of privacy seems a promising candidate for an intellectual history of the idea. Indeed, according to the *Griswold* Court, the colonists carried the notion of privacy with them from the English common law, planting it along with their earliest crops in the rocky soil of the New World and enshrining it in the founding texts of the new nation. In this celebratory view of seventeenth-century events, the germ of a belief in privacy—that is, individual autonomy and freedom from collective scrutiny—inhered in the Anglo-American consciousness,

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England Puritans' shift toward viewing children and family as a wellspring of affection rather than as the locus of communal order and salvation); Daniel Blake Smith, Inside the Great House: Planter Family Life in Eighteenth-Century Chesapeake Society 285-89 (1980) (arguing that the late eighteenth century witnessed a "heightened intimacy within the conjugal family" of southern planters).

4. *See, e.g.*, Rhys Isaac, The Transformation of Virginia, 1740-1790, at 303-05 (1982) (identifying a late-eighteenth-century tendency to view the home as a sanctuary); Jan Lewis, The Pursuit of Happiness: Family and Values in Jefferson's Virginia 210 (1983) (noting that in the era following the American Revolution, "the pursuit of happiness took men and women home").

5. *See, e.g.*, David H. Flaherty, Privacy in Colonial New England 248 (1972) (citing the existence of a privilege—albeit limited—against self-incrimination as evidence of a right to privacy in colonial New England).

essentially unchanged from 1607 to 1965 and beyond.[6] This view has met challenges from such scholars of early American history as John Demos and Edmund Morgan, who characterize colonial communities as committed to an overarching social organization based on the connections among individual grace, divine salvation, and communal welfare.[7] Far from the libertarian paradise that the *Griswold* Court envisioned, colonial New England is for these scholars a tightly knit community, the survival and salvation of which depended on constant public monitoring of what we would now consider quintessentially private behavior, such as childrearing, spirituality, and sexual activity.

Despite disagreements about the extent to which privacy was a value (much less a right) in early America, very few scholars have focused on eighteenth-century notions of privacy. Instead, many historians have avoided the term altogether, concentrating instead on the development of certain aspects of politics and society that they associate with the emergence of a modern, nineteenth-century worldview based on differentiated private and public spheres.[8] This is an unfortunate trend, for it ignores the many early Americans who thought and wrote extensively about the interaction between private activity and public life in the early Republic. If legal scholars have been too quick to take the *Griswold* Court at its word and accept privacy as a foundational American value, historians seem equally hasty in their willingness to treat privacy as a fundamentally modern idea, and therefore to use it only as a lens through which to view early America rather than as a legitimate subject of inquiry. In almost every case, privacy is celebrated as the fruit of Enlightenment reason, a marker of a fully modern society and an unmitigated social good. People who value privacy are in some way "like us"; people who do not are at best not yet ready for modernity and at worst potential pawns of a totalitarian state.[9]

The writings of John Adams demonstrate, however, that at least

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6. At least one scholar has found an "unwritten" right to privacy in colonial America, which he explicitly connects to the *Griswold* decision. *See id.* at 248-49.

7. John Demos, A Little Commonwealth: Family Life in Plymouth Colony (2d ed. 2000); Morgan, *supra* note 3. Nancy Cott has made a related argument in the context of divorce law. *See* Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 33 Wm. & Mary Q. 586 (1976).

8. *See, e.g.*, Helena M. Wall, Fierce Communion: Family and Community in Early America (1990). As Hendrik Hartog has argued in the context of the law of municipal corporations, the nineteenth century was the high tide of formal separation between public and private spheres. *See* Hendrik Hartog, Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870, at 3 (1983).

9. *See, e.g.*, David W. Marcell, *Privacy and the American Character*, 66 S. Atlantic Q. 1 (1967); Thomas H. O'Connor, *The Right to Privacy in Historical Perspective*, 53 Mass. L.Q. 101 (1968). Marcell's and O'Connor's views of privacy as the beneficial and necessary consequence of modernity typify the prevailing attitude in the years immediately following the *Griswold* decision.

one member of the founding generation devoted substantial time and ink to considering the problem of privacy. Adams's writings confirm that privacy was not always among the chief goals of the American republic. On the contrary, Adams displayed a marked suspicion of privacy and the private life. Although he rarely employed the term "privacy," Adams's highly developed political theory assumed the existence of both a public and private realm, arguing consistently that the "private" (a word he frequently used) realm of individual activity comprised only selfish passions and human weakness. Adams therefore premised his theory of government on what he considered a realistic view of human nature, replacing the classical republican ideal of the identity between individual virtue and civic virtue with a systemic solution to humans' tendency toward vice. By severing the connection between the virtue of the citizen and that of the state, Adams drove a wedge between private and public activity, arguing that the private passions for reputation and luxury had to be subdued and controlled by the institutions of government in order for the Republic to function. Adams thus gave up on the private sphere as a source, by itself, of republican virtue and order. As his writings demonstrate, his was among the most developed conceptions of the role of privacy in a republic.

Adams's political theory was not wholly pessimistic with respect to human nature, however. On the contrary, his resistance to the notion of private life stemmed from a basic belief that republican governments required constant scrutiny by citizens, and that citizens should therefore not be permitted to withdraw into the comfortable realm of private interests and pursuits. Rather than constraining individuals' activities, this arrangement would make every citizen "in some degree a statesman," granting an individual the authority "to examine and judge for himself the tendency of political principles and measures."[10] Adams's optimism stemmed from his insistence that this realignment of individuals away from selfish pursuits and toward the welfare of all was possible.

While Adams disdained the activities of the private realm throughout his writings, he never questioned the realm's existence or power. Indeed, his entire system of government was structured to control passion, the private realm's principal component. In contrast to the *Griswold*ian image of the founders as devoted to individual freedom to live beyond the long arm of the state, Adams argued that a nation of citizens engaged only in private pursuits sapped democracy of its strength and subjected unwary citizens to the risk of tyranny. For Adams, privacy clearly existed in early America, but he did not view it as the benign source of autonomy and rights that it would

10. John Adams, *On Self-Delusion*, *in* The Revolutionary Writings of John Adams 11 (C. Bradley Thompson ed., 2000).

become in the twentieth century.[11] Unlike his contemporaries James Madison and Adam Smith, Adams was not willing to believe that the cumulative effect of many private impulses could be harnessed for social good.[12] Madison's and Smith's view may have ultimately prevailed and even paved the way for *Griswold*'s embrace of an affirmative right to privacy. But Adams's refusal to accept private vice as a necessary evil was a crucial step in the transition from classical republicanism based on a virtuous populace to liberal republicanism based on a political structure that sought to cabin the worst human tendencies while redirecting others to beneficial ends.

This Article focuses on John Adams's writings on privacy, which remained remarkably consistent throughout a career spanning more than seven decades. Adams was still discussing political theory with various correspondents, most notably Thomas Jefferson, a few days before he died at the age of eighty-nine on July 4, 1826. Although Adams's reputation has, as he feared, not ascended to the level of such Revolutionary peers as Madison, Jefferson and George Washington, he was one of the most prolific political theorists of his time and has been called "the master psychologist" of American political thought.[13] His major writings, *A Dissertation on the Canon*

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11. Throughout this Article, I will use the terms "privacy," "private life," and "the private realm" more or less interchangeably, with each of them referring to a notion of a realm of human activity that exists apart from an accompanying public realm of politics and civic discourse. The phrase "right to privacy" will be used as a term of art for the constitutional right recognized in *Griswold v. Connecticut* and its predecessor rights at common law.

12. The most famous statement of Madison's philosophy on this point is, of course, *The Federalist* No. 10, in which Madison argued that the evils of faction could be cured by setting those factions loose in a large republic, which would in turn provide maximum freedom and stability to its citizens. The Federalist No. 10, at 64 (James Madison) (Jacob E. Cooke ed., 1961); *see also* Lance Banning, The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic 204 (1995). Similarly, in *The Wealth of Nations*, Adam Smith posited that moral as well as economic benefits on an aggregate scale could result from individual choices:

> But man has almost constant occasion for the help of his brethren, and it is in vain for him to expect it from their benevolence only. He will be more likely to prevail if he can interest their self-love in his favour, and show them that it is for their own advantage to do for him what he requires of them. . . . It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.

Adam Smith, The Wealth of Nations I ch. 2 (Alfred A. Knopf 1991) (1776); *see also* Sheldon S. Wolin, Politics and Vision: Continuity and Innovation in Western Political Thought 333 (1960) (describing Smith's "unseen hand" idea as a "theory of individual moral behavior: both the moral good of society and its material well-being had their origins in instinct, desire, and passion; and neither was the result of action intended to advance the good of society as a whole"); *cf.* Garry Wills, Inventing America: Jefferson's Declaration of Independence 232 (1978) (arguing that Smith emphasized "providential *harmonies* within society" and characterizing Smith a "communitarian" who was "conscripted to individualist uses by nineteenth-century liberalism").

13. Joseph J. Ellis, Passionate Sage: The Character and Legacy of John Adams 47

and Feudal Law (1765), the *Novanglus* letters (1774-75), *A Defence of the Constitutions of Government of the United States of America* (1786-87), and the *Discourses on Davila* (1790-91), canvass the history of republican government from classical to modern times and assess the prospects of success for the embryo republic founded in 1776 on the western rim of the Atlantic Ocean. But they also contain remarkable insight into human nature, bringing a pragmatic perspective to the difficult project of establishing a new government of a type that had not been seen for more than a thousand years.

This Article tracks some of the major themes of Adams's writing on privacy, discussing the impact of his Puritan background on his thought and then moving to the broader issues that most interested him: virtue, passion, decay, and public life. Each of these concepts provided Adams with fodder for contemplating the nature of privacy, and each became a component of his overall vision of the relationship between public and private life. Analyzing these concepts together allows reexamination of Adams's legacy and theory, pulling together the strands of his suspicion of privacy and his deep conviction that the private realm was no place for American citizens to spend the majority of their time.

I. PURITANISM

For an individual who left remarkably complete records of his activities and thoughts, Adams has generated a considerable amount of dispute among historians. One major area of debate has been the impact of Adams's Puritan heritage on his political philosophy—specifically, the degree to which the Puritan ethos of worldly austerity and the faith's close association of political and spiritual life influenced Adams's thinking about the formation of republics. Born to a long line of Massachusetts smallholders, the son of a deacon, Adams received an education that inculcated in him the precepts of Calvinism. Adams seriously considered studying for the ministry, spending the year after his graduation from Harvard fretting about his fitness for the profession and ultimately deciding to pursue a career in law. In his intellectual biography of Adams, C. Bradley Thompson attributes Adams's decision not to enter the ministry to a theological controversy that took place in Adams's hometown of Braintree while he was at Harvard, which ended in the public censure of a clergyman whose views had strayed too close to Arminian doctrines of free will. Shortly thereafter, Adams rejected several foundational tenets of Calvinism, adopting instead what Thompson calls a "religion of civic

(1993). Adams's contemporaries referred to him as "the Atlas" and the "colossus" of independence. David McCullough, John Adams 127, 163 (2001) (quoting Richard Stockton, New Jersey delegate to the Continental Congress, and Thomas Jefferson, respectively).

morality" influenced by Lockean and Newtonian thought as well as the writings of several liberal English theologians.[14]

Despite Adams's youthful protestations against Calvinism, reformed Christianity clearly remained important in his thought. At a minimum, it harmonized with his political philosophy, providing a theological underpinning for his theories. Writing in 1796, Adams observed that a "great Advantage" of Christianity was that it taught the "Duties and Rights of The Man and the Citizen." Promises of "future Life are thus added to the Observance of civil and political as well as domestic and private Duties."[15] Moreover, on several occasions the young Adams draped himself in the mantle of seventeenth-century Puritan worthies, engaging in 1767 in a spirited exchange of articles under the name "Governor Winthrop" with an interlocutor calling himself "Governor Bradford." The articles had nothing to do with religion, focusing on a controversy in the Massachusetts House of Representatives and urging the people of Massachusetts not to allow the repeal of the Stamp Act to dissuade them from their newfound American patriotism. Yet Adams's identification with the leader of the Puritan Massachusetts Bay Colony was motivated by more than simple expedience. The very language that Adams employed sounded the century-old Calvinist themes of decadence and renewal, connecting the health of the individual body with that of the civic body: "Calamities are the caustics and cathartics of the body politic. They arouse the soul. They restore original virtues. They reduce a constitution back to its first principles."[16] Haranguing his fellow colonists not to allow British overtures to lull them into "such a tame, torpid state of indolence and inattention, that the missionaries of slavery are suffered to preach their abominable doctrines,"[17] Adams borrowed the rhetoric of what Edmund Morgan calls "the Puritan Ethic," embracing adversity as an opportunity to test the mettle of one's faith.[18]

Puritanism therefore had a profound influence on Adams, as it did on many members of the Revolutionary generation.[19] Certainly, Puritan theology and Adams's Revolutionary thought shared at least one characteristic: distrust of a too-private life, with its potential to detach individuals from the Puritan commonwealth or the republican

14. C. Bradley Thompson, John Adams and the Spirit of Liberty 6-13, 23 (1998).

15. *Id.* at 23 (quoting 3 Diary and Autobiography of John Adams 240-41 (L.H. Butterfield ed., 1962)).

16. John Adams, *Governor Winthrop to Governor Bradford, in* The Revolutionary Writings of John Adams 60 (C. Bradley Thompson ed., 2000).

17. *Id.*

18. Edmund S. Morgan, *The Puritan Ethic and the American Revolution*, 24 Wm. & Mary Q. 3 (1967).

19. *See id.*; *see also* Richard L. Bushman, From Puritan to Yankee: Character and the Social Order in Connecticut, 1690-1765 (1967); Michael Walzer, The Revolution of the Saints: A Study in the Origins of Radical Politics (Atheneum 1976) (1965).

state. To stave off such offenses to the polity, Puritan communities engaged in elaborate surveillance and prosecution of deviant behavior and issued jeremiads against corruption and decline. Adams, for his part, engaged in his own laments of human nature, as when he railed in 1774 against Bostonians' boundless greed for imported British tea:

> What numbers there are in every community, who have no providence or prudence in their private affairs, but will go on indulging the present appetite, prejudice, or passion, to the ruin of their estates and families, as well as their own health and characters! How much larger is the number of those who have no foresight for the public, or consideration of the freedom of posterity! . . . Must the wise, the virtuous and worthy part of the community, who constituted a very great majority, surrender their liberty, and involve their posterity in misery, in complaisance to a detestable, though small, party of knaves, and a despicable, though more numerous, company of fools?[20]

Would the wise, the virtuous, and the worthy be degraded into the same dependence on imported luxuries that afflicted the knaves and fools? Or would the knaves and fools realize the wickedness of their ways and reform in time to save their entire community? Adams's critique explicitly linked "private affairs" with the "public" and with "posterity," spelling out the dire consequences of the unwholesome "appetite, prejudice, or passion" that he saw in his fellow citizens. The nature of the distress was clear: Private choices caused public hardship and rendered the town vulnerable to further British exploitation. But Adams's diatribe contains far more than this simple statement of cause and effect. As his Puritan forbears had done, Adams condemned the private weaknesses that endangered the entire community. Like his ancestors' Puritan zeal, which linked "[p]ersonal salvation and national reformation" in a "highly collective emotion," Adams's revolutionary rhetoric deplored private interests and self-involved citizens.[21] The two strains of thought thus shared a language based on the quest for virtue, the inevitability of corruption, the remoteness of salvation, and the enervating effects of worldly luxury. As Edmund Morgan has argued, the colonial boycott movements represented "a way of reaffirming and rehabilitating the virtues of the Puritan Ethic," in particular the idea that "adversity provided a spur to virtue."[22] Virtue, however, would prove more elusive in the 1770s and 1780s than it had for any previous generation, leading Adams to conclude that private virtue could not sustain a republic.

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20. John Adams, *Novanglus, No. VI*, *in* The Revolutionary Writings of John Adams 213 (C. Bradley Thompson ed., 2000).

21. *See* Walzer, *supra* note 19, at 170, 12.

22. Morgan, *supra* note 18, at 8.

II. VIRTUE

In addition to the Puritan Ethic, the Revolutionary generation was deeply affected by the ideals of the classical republican (or civic humanist) tradition, which J.G.A. Pocock has described as "anchored in the Florentine Renaissance, Anglicized by James Harrington, Algernon Sidney, and Henry St. John, Viscount Bolingbroke, but looking unmistakably back to antiquity and to Aristotle, Polybius, and Cicero."[23] The essential element of classical republicanism was its reliance on citizen virtue to maintain the fragile balance between tyranny (defined as an excess of monarchy) and anarchy (defined as an excess of democracy). A republic, therefore, demanded what Gordon Wood terms "extraordinary moral character" of its people, in that "each man must somehow be persuaded to submerge his personal wants into the greater good of the whole."[24] This public virtue would stem from individuals' private virtue, in a process of aggregation and cumulation of acts of virtue between citizens.

By the 1780s, however, the promises of classical republicanism appeared to many Americans as nothing more than empty blandishments. Under the relatively weak structure of the Articles of Confederation, state legislatures seemed to have run amok, passing and then rapidly repealing laws, engaging in irresponsible paper money schemes, passing debtor-friendly legislation that hindered collection by creditors, and abandoning themselves to the type of "democratic despotism" that Adams and others had once viewed as a contradiction in terms.[25] In late 1786, the rebellion led by Daniel Shays in western Massachusetts, which protested high taxes and demanded additional debtor relief, provided vivid evidence of the defects of the Confederation. To the emerging Federalist camp, which counted Adams among its more independent members, the conclusion was clear: The people's virtue provided an insufficient foundation on which to build the national edifice. The very institutions of government would have to be reconstituted in order to bolster capricious citizen character with steady, systemic structures. As Wood puts it, the Federalists "hoped to create an entirely new and original sort of republican government—a republic which did not require a virtuous people for its sustenance." Because American character had proved insufficiently virtuous to support the republic, the republic would have to be reformed so as to "moderate the effects of its viciousness."[26]

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23. J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 J. Interdisc. Hist. 119, 120 (1972).

24. Gordon S. Wood, The Creation of the American Republic, 1776-1787, at 68 (1969).

25. *Id.* at 404.

26. *Id.* at 475. J.G.A. Pocock has charged Wood with exaggerating the magnitude of the shift that occurred in republican thought in 1787-88, arguing that a balanced

Adams, who approved of the new Constitution that emerged out of the postwar desire for structure, consistently warned against relying solely on individual virtue, which he considered "the effect of the well ordered constitution, rather than the cause."[27] Unfortunately for his contemporaries and for posterity, however, Adams observed the post-Revolutionary crisis from England, where he served from 1785 to 1788 as the Republic's first minister to the Court of St. James. He could not contribute his considerable expertise on the subject of human vice and virtue to the Constitutional Convention, which met in Philadelphia from 1787 to 1788. Despite his distance from his nascent nation, however, the indefatigable Adams busied himself between visits to the frosty Hanoverian court by penning his three-volume *Defence of the Constitutions of the United States of America*. True to its name, the *Defence* undertook to rebut the claim of French radical Anne-Robert-Jacques Turgot that the bicameral constitutions adopted by virtually all the American states, including Adams's own Massachusetts constitution, merely reproduced the outmoded and anti-democratic structure of the British constitution. Yet Adams's interest in defending the states' tripartite "mixed governments" did not prevent him from including his views on virtue in the *Defence*.

According to Adams, virtue and its components, such as the love of liberty, were insufficient—and possibly unnecessary—elements of republican government. Indeed, Adams expanded the Federalist anxiety about the inadequacy of virtue, fearing not only that a lack of private *virtue* would prove unable to counterbalance government corruption but also that private *corruption* might replace virtue and gnaw away at the republic from within. In other words, Adams found in virtue another reason to distrust citizens in their capacity as private individuals. "The numbers of men in all ages have preferred ease, slumber, and good cheer to liberty, when they have been in competition," Adams wrote. "We must not then depend alone upon the love of liberty in the soul of man for its preservation."[28] As in the early days of the war, when he had lambasted his fellow citizens as "knaves" and "fools" for failing to curb their thirst for tea and thereby ensuring the colony's dependence on British trade, Adams argued in the 1780s and 1790s that a government could not rely on its citizens to possess the discipline or will to choose the virtuous course of action

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republic of one, few, and many need not be the only arena for classical virtue. *See* Pocock, *supra* note 23, at 133. As Adams's writings make clear, however, the founders had by the 1780s abandoned classical virtue as a realistic basis on which to build a nation.

27. John Adams, 3 A Defence of the Constitutions of Government of the United States of America (1786-87), *reprinted in* 6 The Works of John Adams, Second President of the United States: With a Life of the Author 1, 219 (Charles Francis Adams ed., 1851).

28. Letter from John Adams to Samuel Adams (Oct. 18, 1790), *reprinted in* The Political Writings of John Adams 664, 668 (George W. Carey ed., 2000).

for themselves or their country. Absent this private will, therefore, Adams called on organized, public entities to step in and take charge.

Reflecting on the state of the nation in a 1790 letter to Samuel Adams, then-Vice President John Adams wrote:

> "The love of liberty," you say, "is interwoven in the soul of man." So it is . . . in that of a wolf; and I doubt whether it be much more rational, generous, or social, in one than in the other, until in man it is enlightened by experience, reflection, education, and civil and political institutions . . . .[29]

With his readiness to give up on virtue altogether as a source of political order, Adams essentially severed the classical causal link between private behavior and public result. In its place, he offered a systemic solution that, unlike the Federalist Constitution, established a public realm of balanced government and checks on power that explicitly sought to control the "[s]elf-interest, private avidity, ambition, and avarice" that he viewed as the dominant threats to the stability of the new republic.[30] Unlike Madison, who believed that public benefits could be reaped from private defects (e.g., the desire to form factions) if those defects were properly harnessed, Adams refused to believe that private impulses could be rehabilitated and insisted that they had no place in a healthy government.

Moreover, Adams believed that government ought to bind citizens together and encourage them to become invested in the commonwealth. To this end, he argued that government should "compel all to respect the common right, the public good, the universal law, in preference to all private and partial considerations."[31] This goal stands in sharp contrast to that of the English-derived "Country ideology" that J.G.A. Pocock associates with Revolutionary thought. In Pocock's view, Country ideology envisioned a man "so independent of other men and their social structures that his dedication to the *res publica* could be wholly autonomous."[32] To Adams, the risk that men and women left alone would surrender to their private vices was simply too great to rely on anything except the controlling power of public authority. The inevitability of vice (or, to use the Puritan term, sin) was a major premise of Adams's conclusion that private drives had to be subordinated to public objectives. The notion that citizens possessed a "right to be let alone" would have struck Adams as mere sophistry, a clever justification for a lack of prudence and restraint.[33]

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29. *Id.*

30. John Adams, 3 A Defence of the Constitutions of Government of the United States of America, *reprinted in* The Political Writings of John Adams: Representative Selections 105, 150 (George A. Peek, Jr. ed., 1954).

31. *Id.* at 147.

32. Pocock, *supra* note 23, at 122, 129.

33. By 1890, however, Adams's distrust of unchecked human nature had clearly

III. PASSION

Once virtue had lost its primacy in republican political theory, there remained one source of private influence on public affairs: the passions. For Adams and his contemporaries, the term "passion" encompassed varied human desires, such as the desire for reputation, for wealth, and for all other forms of gratification. Although some scholars, such as Albert Hirschman, have argued that early-eighteenth-century thought transformed the passions from a destructive and sinful force to a creative and beneficial one, many of the founders—and Adams in particular—remained influenced by the older notion of passions as harmful, selfish, and fundamentally irrational.[34] Indeed, in the minds of Adams and his contemporaries, the passions represented the primary impediment to private virtue, and therefore the primary incitement to bad behavior. By the time he was twenty years old, Adams had developed the perspective on passion that would inform his political theory for the rest of his life:

> He is not a wise man, and is unfit to fill any important station in society, that has left one passion in his soul unsubdued. . . . These passions should be bound fast, and brought under the yoke. Untamed, they are lawless bulls; they roar and bluster, defy all control, and sometimes murder their proper owner. But, properly inured to obedience, they take their places under the yoke without noise, and labor vigorously in their master's service.[35]

Like vice, passion inhered in human nature; unlike vice, however, it could be controlled and used in the service of public order.

Thirty-two years after Adams advocated yoking private passion to the service of the common weal, reformers such as Madison made a similar case for their new Constitution. As part of their effort to replace a government that depended on the people's virtue with one that incorporated the people's shortcomings in its very structure, Madison and the other drafters produced a Constitution that, in the words of Gordon Wood, "cut through the structure of the states to the people themselves and yet was not dependent on the character of that people."[36] In essence, the Constitution "depended for stability, not on virtue, but upon the counterbalanced energies of competing private interests."[37] The relatively benign-sounding "interest" concealed a

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fallen out of favor. Brandeis and Warren described privacy as "the right to enjoy life,—the right to be let alone." Warren & Brandeis, *supra* note 1, at 193.

34. *See* Albert O. Hirschman, The Passions and the Interests: Political Arguments for Capitalism Before Its Triumph 47 (rev. ed. 1997).

35. John Adams, Diary: With Passages from an Autobiography (June 14, 1756), *in* 2 The Works of John Adams, Second President of the United States: With a Life of the Author 3, 22 (Charles Francis Adams ed., 1850).

36. Wood, *supra* note 24, at 475.

37. Christopher Grasso, A Speaking Aristocracy: Transforming Public Discourse in Eighteenth-Century Connecticut 361 (1999).

neat legerdemain, insofar as it was a euphemism for a passion that could be deliberately controlled and deployed against another, more destructive passion.[38] In *The Federalist* No. 51, Madison articulated the revolutionary idea that the very architecture of government could direct the passions toward productive ends:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is, to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual may be a centinel over the public rights. These inventions of prudence cannot be less requisite in the distribution of the supreme powers of the state.[39]

Realizing that ungoverned passions could only sink the Republic in the quagmire of personal desires and squabbles, Madison argued that the structure of the Constitution allowed it to check the passions' destructive effects and even extract benefits from them by pitting interest against interest.

Adams concurred in the need for the state to act as what Hirschman calls "a transformer, a civilizing medium."[40] Yet Adams did not share even the guarded optimism of *The Federalist* No. 51, for he placed no trust in the ability of private interests to stand guard over public rights. On the contrary, he firmly believed that only the public realm of the state possessed the necessary architecture to act as a sentinel.[41] For Adams, government's primary purpose was regulating the passions. Indeed, he feared that ignoring the passions or pretending that they did not exist would lead to the kind of tyranny that had gripped revolutionary France—a futile search for human perfectibility that would inevitably lead to violence and destruction. While Adams was serving as vice president, he exhorted the French people to use government as a check on passion rather than as an excuse to

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38. *See* Hirschman, *supra* note 34, at 20-21.

39. The Federalist No. 51 (James Madison), *supra* note 12, at 349. As Lance Banning has noted, however, it is a mistake to read *The Federalist* No. 51 as a complete departure from the British republican tradition. *See* Banning, *supra* note 12, at 214-19.

40. Hirschman, *supra* note 34, at 16.

41. Adams set forth his vision of private interests kept in check by the state in an 1813 letter to Jefferson, in which Adams described the place of aristocracy in a mixed government.

> If I could prevent its deleterious influence I would put it all into 'The Hole' of Calcutta: but as this is impossible, as it is a Phoenix that rises again out of its own Ashes, I know no better Way than to chain it in a 'Hole by itself,' and place a *Watchfull Centinel* on each Side of it.

Letter from John Adams to Thomas Jefferson (Dec. 19, 1813), *in* 2 The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams 409 (Lester J. Cappon ed., 1959) (emphasis added).

surrender to baser interests. "Frenchmen! Act and think like yourselves!," Adams implored in *Discourses on Davila*, his series of letters published in the *Gazette of the United States* between 1790 and 1791. "Consider that government is intended to set bounds to passions which nature has not limited; and to assist reason, conscience, justice, and truth in controlling interests which without it would be as unjust as uncontrollable."[42] The public realm of government, therefore, would necessarily possess a monopoly on the power to "restrict the public expression of passions inimical to the cultivation of man's reason."[43] If passions represented the private side of life, reason exemplified the virtues of the public realm—the realm that truly mattered.[44]

Moreover, contrary to the charges of his many critics, Adams believed that passions influenced interactions at all levels of society and were not simply confined to the binary of the few versus the many.[45] For Adams, the most disruptive passions were also the most universal: the related desires of emulation, ambition, jealousy, and envy, all of which he attributed to the "*[s]pectemur agendo*" impulse[46] (literally, "Let us be seen in action"),[47] which Adams considered "the great principle of activity for the good of others."[48] This "*passion for distinction*" infected all men, for the "desire to be observed, considered, esteemed, praised, beloved, and admired by his fellows is one of the earliest as well as keenest dispositions discovered in the heart of man."[49]

Needless to say, this passion required a social realm to provide an arena for the ritual display and affirmation of individuals' reputation. Something more was needed, however, to transform the social arena from a mere theatre of personality to a genuinely public realm devoted to the people's welfare (*salus populi*). Adams insisted that only government could curb the destructive nature of the passion for distinction and extract some small benefit. "It is a principal end of

42. John Adams, Discourses on Davila (1790-91), *reprinted in* The Political Writings of John Adams: Representative Selections 190-91 (George A. Peek, Jr. ed., 1954). In a footnote dated 1813, Adams commented, "Frenchmen neither saw, heard, nor felt or understood this." *Id.* at 191 n.15.

43. Grant B. Mindle, *Liberalism, Privacy, and Autonomy*, 51 J. Pol. 575, 577 (1989).

44. *See id.* at 576-77.

45. The most notable modern proponent of this view is Gordon Wood, who has argued that Adams viewed politics as a contest between the interests of democracy and those of the aristocracy. *See* Wood, *supra* note 24, at 576. Adams's most vociferous contemporary critic was John Taylor of Caroline, whose 1814 *Inquiry into the Principles and Policy of the Government of the United States* aimed to rebut Adams's *Defence of the Constitutions of Government.* Taylor claimed to have spent more than twenty years composing his five-hundred-page tome.

46. Adams, *supra* note 30, at 178.

47. Thompson, *supra* note 14, at 154.

48. Adams, *supra* note 30, at 178.

49. *Id.* at 176.

government to regulate this passion," Adams wrote in *Davila*, "which in its turn becomes a principal means of government."[50] Keenly aware of the dangers of either leaving the passions unregulated or simply ignoring them, as he felt the French revolutionaries had, Adams feared the corruption and degeneracy that awaited an insufficiently vigilant government and a citizenry engrossed in the pursuit of private passions. In contrast to the attitude of post-*Griswold* Americans, Adams saw only chaos resulting from the belief that individual autonomy represented an end in itself.

IV. DECAY

The threat of social decay lurked close to the surface of Adams's thought, as it did for virtually every member of the founding generation. Chief among the founders' fears was the prospect that all nations—including their own infant one—might be bound to an immutable biological progression of birth, maturity, decay, and death.[51] Far from a vague forecast of events that might occur in subsequent centuries, the prognosis provided clear signposts for monitoring the health of one's nation. Adams, for example, inveighed against the indicia of refinement that late-eighteenth-century Americans increasingly adopted, associating such fripperies as "balls, assemblages, cards, equipage, tea, and elegance of every kind with monarchy" and other noxious forms of late-stage civilization.[52] Anxious that the life cycle of the Republic might have already commenced, Adams and his contemporaries searched constantly for harbingers of social collapse.

Inevitably, they turned to their fellow citizens, seeking clues to the fate of society in individual behavior. And oftentimes, Adams and his associates found their contemporaries wanting, in thrall to the *spectemur agendo* as well as the more prosaic temptations of luxury items such as coffee, sugar, and imported manufactured goods. Such shortsightedness infuriated Adams as much in the 1790s as it had in 1774, when he had accused Bostonians of truckling to British commercial interests by continuing to consume imported tea. Adams consistently viewed such actions as a selfish retreat into privacy, an irresponsible refusal to recognize the public, political consequences of individual decisions. His disapproval of such myopia was compounded by his belief that it was all too common. Adams

50. *Id.* at 178.

51. *See* Drew R. McCoy, The Elusive Republic: Political Economy in Jeffersonian America 33 (1980).

52. Richard L. Bushman, The Refinement of America: Persons, Houses, Cities 193 (1992). Bushman focuses specifically on Adams's reaction to the spread of genteel culture, describing Adams as an "outspoken" but ambivalent critic of refinement and noting that both John and Abigail Adams enjoyed the cosmopolitan delights of Parisian society when they lived there between 1783 and 1785. *Id.* at 197.

therefore approached the problems of luxury and decadence much as he had the problem of passion: He advocated designing institutional structures that would compensate for the dangerous proclivities of private citizens and encourage them to view private behavior as intimately connected to the fate of the Republic.

This "paradigm of virtue and corruption," to use J.G.A. Pocock's term, encouraged Adams and his contemporaries in their belief that individual decadence—on the part of both leaders and citizens—could spread into public life, thereby infecting the social and political fabric of the nation.[53] In 1770, Adams confided to his diary his fears of social decay and its effect on government:

> In times of simplicity and innocence, ability and integrity will be the principal recommendations to the public service, and the sole title to those honors and emoluments which are in the power of the public to bestow. But when elegance, luxury, and effeminacy begin to be established, these rewards will begin to be distributed to vanity and folly; but when a government becomes totally corrupted, the system of God Almighty in the government of the world, and the rules of all good government upon earth, will be reversed, and virtue, integrity, and ability, will become the objects of the malice, hatred, and revenge of the men in power, and folly, vice, and villany will be cherished and supported.[54]

Adams's diary entry painted a bleak picture of a government sapped of fortitude and a society bereft of character. As a young man witnessing the first struggles for independence, he envisioned the creep of corruption originating with the people and spreading to the state, easily making the leap from private to public decadence. Writing to his wife, Abigail, in 1776, Adams enumerated the elements of a corrupt society—"Vanity, and Gaiety, a Love of Pomp and Dress, Furniture, Equipage, Buildings, great Company, expensive Diversions, and elegant Entertainments"—and could only conclude, "[T]here is no knowing where they will stop, nor into what Evils, natural, moral, or political, they will lead us."[55] These misgivings about human nature, which Adams considered simple realism, remained with him throughout his life.[56]

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53. J.G.A. Pocock, Virtue, Commerce, and History: Essays on Political Thought, Chiefly in the Eighteenth Century 48 (1985).

54. John Adams, Diary: With Passages from an Autobiography (Aug. 22, 1770), *in* 2 The Works of John Adams, Second President of the United States: With a Life of the Author 250-51 (Charles Francis Adams ed., 1850).

55. Bushman, *supra* note 19, at 199 (quoting Adams). Shortly after his inauguration as president in 1797, Adams himself felt compelled to resist the allure of European-style equipage when he learned that Abigail, who was at home in Quincy, Massachusetts, had had the family coat of arms painted on her carriage. He immediately asked her to have the device painted out, commenting, "They shall have a republican President in earnest." McCullough, *supra* note 13, at 468.

56. On this point, I disagree with the conclusion of several historians who posit a dramatic shift in Adams's attitude toward the morality of the American people

Yet Adams's unflattering characterization of the American character should not be taken as evidence of thoroughgoing pessimism about the fate of the Republic. On the contrary, as a young man and in his latter years, Adams believed that the institutional structure of government could provide a mechanism for harnessing passion and putting it to work in the service of the public. In keeping with the Federalist shift away from the classical politics of virtue, Adams "believed that a virtuous citizenry could be generated by channeling the passions through a well-balanced constitution."[57] Once again, Adams looked hopefully toward public, institutional solutions to private, individual problems. As he wrote to Mercy Otis Warren in 1776 and reiterated a decade later in *A Defence of the Constitutions*, "the Form of Government . . . gives the decisive Colour to the Manners of the People, more than any other Thing."[58] The problem, therefore, was "to find a form of government best calculated to prevent the bad effects and corruption of luxury, when, in the ordinary course of things, it must be expected to come in."[59]

Notwithstanding the ostensibly tonic effects of the Constitution on republican morality, Adams constantly worried that the success of the American endeavor might condemn the young nation to treading the same gilded path as its debauched elder sisters in Europe. Just as he feared that underestimating the destructive capacity of private passion might doom the United States to French-style anarchy, Adams warned his contemporaries that giving in to fashion and greed might lead to the "luxury, effeminacy, and venality" that had "arrived at such a shocking pitch in England."[60] Adams thus explicitly connected the moral corruption of private individuals with the decay of public virtue. "I fear that human nature will be found to be the same in America as it has been in Europe, and that the true principles of

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between the 1770s and the 1790s. Notable among this group is John R. Howe, Jr. *See* John R. Howe, Jr., The Changing Political Thought of John Adams (1966).

57. Thompson, *supra* note 14, at 199.

58. Letter from John Adams to Mercy Otis Warren (Jan. 8, 1776), *in* 3 The Papers of John Adams 397-98 (Robert J. Taylor et al. eds., 1979).

59. Adams, *supra* note 27, at 94.

60. John Adams, *Novanglus, No. II*, *in* 4 The Works of John Adams, Second President of the United States: With a Life of the Author 28 (Charles Francis Adams ed., reprint 1969) (1850). A gloomy Adams reiterated this point in a letter to Jefferson written in 1787, when war with France seemed imminent:

> The War that is now breaking out will render our Country, whether she is forced into it, or not, rich, great and powerful in comparison of what she now is, and Riches Grandeur and Power will have the same effect upon American as it has upon European minds. We have seen enough already to be sure of this. A Covent Garden Rake will never be wise enough to take warning from the Claps caught by his Companions. When he comes to be poxed himself he may possibly repent and reform.

Letter from John Adams to Thomas Jefferson (Oct. 9, 1787), *in* 1 The Adams-Jefferson Letters: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams 203 (Lester J. Cappon ed., 1959).

liberty will not be sufficiently attended to," he wrote in 1776.[61] Retreat to the secluded confines of fine carriages and fashionable drawing rooms would constitute abandonment of the republican project. Worse, a mass surrender to luxury would drain the public realm of its lifeblood, replacing vigorous, civic morality with lax, selfish indulgence. Even the most carefully crafted system of balanced government might not be able to compensate for such a vacuum of private integrity. With this fear in mind, Adams in *Davila* exhorted his fellow citizens to marshal their republican mettle in the face of mounting aggression abroad and party conflict at home:

> Americans! . . . . Instead of following any foreign example, to return to *the legislation of confusion*, contemplate the means of restoring decency, honesty, and order in society by preserving and completing, if anything should be found necessary to complete, the balance of your government. In a well-balanced government, reason, conscience, truth, and virtue must be respected by all parties, and exerted for the public good.[62]

Corruption on an individual level led directly to confusion and disorder in the public realm. The most feasible solution was to bolster the institutions of government and hope that they could contain the soporific effects of luxury.

V. PUBLIC LIFE

Despite Adams's preoccupation with the consequences of human weakness, at no point did he completely despair of the potential of the American people to shake off their torpor of vice, passions, and luxury and to throw themselves into the project of self-government. His distrust of the private side of life did not lead him to endorse the kind of invasive, totalitarian state that modern observers typically associate with societies that do not recognize a right to individual privacy. On the contrary, Adams believed that people must act as engaged citizens first, and individuals only secondarily, to avoid political enslavement and achieve liberation. For Adams, unlike for his post-*Griswold* descendants, privacy was not a right that an individual claimed against the state but a condition that prevented citizens from engaging in self-government. Arguments for privacy, therefore, sounded to Adams and his contemporaries suspiciously close to calls for citizens to withdraw from the realm of government and society and to bury themselves in the pursuits of reputation, wealth, and comfort. Such a scenario characterized the tyrannical

61. Letter from John Adams to Joseph Hawley (Aug. 25, 1776), *in* The Political Writings of John Adams 654 (George W. Carey ed., 2000).

62. John Adams, Discourses on Davila (1790-91), *reprinted in* The Political Writings of John Adams: Representative Selections 191 (George A. Peek, Jr. ed., 1954).

governments of the Old World, where palace intrigues and court machinations unfolded far from the lives of everyday subjects. In these societies, a vast gulf separated the private lives of individuals from the realm of public authority. Adams, however, insisted that republican government required an enlightened citizenry that would emerge from the private realm of home and work to monitor, question, and inform the work of government in a kind of Habermasian "public sphere in the political realm."[63] Thus, Adams trusted the private individual only when he or she was willing to enter the public zone.

On a practical level, then, Adams subscribed to the belief that "self-immersion" in the comforts of life would inevitably endanger republican government by distracting citizens from civic responsibility.[64] As he wrote to Mercy Otis Warren in 1776, the new republic would require "a positive Passion for the public good, the public Interest, Honour, Power and Glory, established in the Minds of the People." This public passion therefore had to be "Superiour to all private Passions." In short, Adams wrote, "[A]ll Things must give Way to the public."[65] Specifically, he argued that citizens must constantly scrutinize the affairs of government, putting aside their private pursuits in order to shine a cleansing light on the public realm. Passive acquiescence in the decisions of government did not befit citizens of a republic, Adams believed. At no time was he more proud of his fellow citizens than when they first came together to resist the Stamp Act. "The year 1765 has been the most remarkable year of my life," he confided to his diary.

> The people, even to the lowest ranks, have become more attentive to their liberties, more inquisitive about them, and more determined to defend them, than they were ever before known or had occasion to be.... Our presses have groaned, our pulpits have thundered, our legislatures have resolved, our towns have voted; the crown officers have everywhere trembled, and all their little tools and creatures been afraid to speak and ashamed to be seen.[66]

Nevertheless, Adams ruefully concluded that determination alone

63. Jürgen Habermas, The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society 30 (Thomas Burger & Frederick Lawrence trans., MIT Press 2000) (1990). For a discussion of the role of the "bourgeois public sphere" in the context of early Republican print culture, see Michael Warner, The Letters of the Republic: Publication and the Public Sphere in Eighteenth-Century America (1990).

64. Lance Banning, *Some Second Thoughts on Virtue and the Course of Revolutionary Thinking*, *in* Conceptual Change and the Constitution 194, 200 (Terence Ball & J.G.A. Pocock eds., 1988).

65. Letter from John Adams to Mercy Otis Warren (Apr. 16, 1776), *quoted in* Howe, *supra* note 56, at 31-32.

66. John Adams, Diary: With Passages from an Autobiography (Dec. 18, 1765), *in* 2 The Works of John Adams, Second President of the United States: With a Life of the Author 154 (Charles Francis Adams ed., 1850).

would not ensure liberty. "This spirit, however, has not yet been sufficient to banish from persons in authority that timidity which they have discovered from the beginning."[67] Also necessary was thoroughgoing vigilance on the part of citizens, such that their rights could not be threatened in the first place. In short, private life would have to be subordinated to public life in order to draw citizens into the political realm and keep them there. "[T]he spirit of liberty is and ought to be a jealous, a watchful spirit," Adams wrote in the guise of Governor Winthrop. "*Obsta Principiis* [resist the first beginnings] is her motto and maxim; knowing that her enemies are secret and cunning, making the earliest advances slowly, silently, and softly."[68] This jealous watchfulness would prove salutary to citizens as well as the state; moreover, it would bring private passions to bear on the public realm of government. Convinced that "citizens neither could nor should act selflessly," Adams and his fellow Revolutionaries put selfishness to work by asking citizens to enter the political fray and defend their liberties against government encroachment.[69]

Indeed, even the famous writs of assistance case of 1761, in which James Otis argued that the general search warrants issued to customs officers violated the natural rights of Englishmen and were therefore void, can be viewed not simply as a precursor to the Fourth Amendment search-and-seizure rules but also as a statement of a particularly eighteenth-century vision of privacy.[70] Adams's autobiography suggests that he viewed the controversy as a dispute about the rights of the citizenry to live unmolested by the long arm of the British Crown rather than the rights of a single citizen to be free from the inquiries of customs surveyor general Thomas Lechmere:

> England proud of its power and holding Us in Contempt would never give up its pretentions. The Americans devoutly attached to their Liberties, would never submit, at least without an entire devastation of the Country, and a general destruction of their Lives.[71]

Years later, Adams struck a similarly grand note in describing the scene in the Council Chamber of Boston's Town House: "Every Man of a crowded Audience appeared to me to go away, as I did, ready to take Arms against Writs of Assistance. Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great

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67. *Id.* at 154-55.

68. John Adams, Governor Winthrop to Governor Bradford (1767), *reprinted in* 1 Papers of John Adams 200 (Robert J. Taylor et al. eds., 1979) (emphasis added).

69. *See* Banning, *supra* note 64, at 199.

70. *See generally* William Cuddihy & B. Carmon Hardy, *A Man's House Was Not His Castle: Origins of the Fourth Amendment to the United States Constitution*, 37 Wm. & Mary Q. 371 (1980) (discussing the writs of assistance case).

71. John Adams: A Biography in His Own Words 53 (James Bishop Peabody ed., 1973) (quoting Adams).

Britain."[72] Notwithstanding the likelihood that Adams indulged in a few ex post rhetorical embellishments, the tenor of the comments suggests that Adams viewed the writs of assistance case as involving a kind of common, public privacy—the shielding of the citizenry from a particular overweening government, not the defense of individuals from intrusions in general. Adams's celebration of the case thus comported with his overarching belief that citizens ought to be encouraged to enter the public sphere and protected when they did so.

For Adams and many of his contemporaries, then, the public realm determined the nature, content, and extent of the private realm.[73] Adams's statement to Warren that "all Things must give Way to the Public" suggested that he espoused what Quentin Skinner has called the essence of the neo-roman theory of the state: namely, "that it is only possible to be free in a free state."[74] In other words, the conditions of individuals' private lives stemmed directly from the condition of their government. Still more abstractly, Adams's statement suggests a fully developed vision of differentiated public and private spheres, and a consequent quest to submerge private desires and passions in the larger project of building the Republic. This point is both historical and historiographical, for it relates to what one scholar terms the "convergence of public sphere theory and the history of private life."[75] That is, there exist many theories of the public sphere and perhaps still more histories of private life. Yet very few historians have proposed theories of the private sphere, despite the obsession of post-*Griswold* jurisprudence and political theory with individual privacy. Has the twentieth-century valorization of privacy in the form of personal autonomy prevented historians from examining the intellectual history of the concept? Quite possibly. As Adams's writings demonstrate, however, many eighteenth-century Americans thought extensively about privacy, believed that it existed,

72. *Id.* at 55 (quoting Adams). For a complete account of the trial and Adams's involvement, see 2 Legal Papers of John Adams 106-47 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

73. This is the most profound point of disagreement between the Adams view and the Brandeis-Warren view. Brandeis and Warren based their newly discovered right to privacy on a vision of individual autonomy, which they saw as the basis of an enlightened civilization: "[T]he protection of society must come mainly through a recognition of the rights of the individual. Each man is responsible for his own acts and omissions only." Warren & Brandeis, *supra* note 1, at 219-20. At least one legal scholar has pointed out that Brandeis and Warren's purported common law right to privacy, which they claimed had evolved in Anglo-American law, was "not . . . a picture of the law as it was, but of the law as they believed (or hoped) it should be." Ken Gormley, *One Hundred Years of Privacy*, 1992 Wis. L. Rev. 1335, 1347-48.

74. Quentin Skinner, Liberty Before Liberalism 60 (1998). Skinner's "neo-roman" theory is essentially analogous to the republican or civic humanist tradition.

75. Dena Goodman, *Public Sphere and Private Life: Toward a Synthesis of Current Historiographical Approaches to the Old Regime*, 31 Hist. & Theory 1, 12 (1992). Goodman's primary focus is the Old Regime in France, but her analysis is equally applicable to the early American republic.

but ultimately concluded that it was slippery stuff not to be trusted except in controlled conditions.

VI. CONCLUSION

The concept of privacy has not been altogether absent from the historiography of the early Republic. A few scholars agree that the founders took a dim view of privacy. According to Gordon Wood, the Federalists charged the Articles of Confederation with permitting greed and speculation to run rampant, leading to large-scale social and political disintegration: "The wholesale pursuits of private interest and private luxury were, they thought, undermining America's capacity for republican government. They designed the Constitution in order to save American republicanism from the deadly effects of these private pursuits of happiness."[76] Grant Mindle, meanwhile, has argued that the founders disparaged privacy, exiling it to the realm of passion and offering it limited protection under the rubric of "property."[77] Insofar as they suggest that the founders did not embrace the concept of privacy, both historians paint a picture of the founding generation that is decidedly at odds with the *Griswold* story of the-right-that-was-there-all-along, a story that Adams's writings also call into question. Yet Wood's instrumental, causation-focused argument suggests that the founders' true motivation was a fear of popular politics more than of privacy per se, and Mindle's insistence on contrasting the founders with the Brandeis-Warren and twentieth-century visions of privacy possesses overtones of the asymptotic search for original intent. Moreover, Wood attributes the founders' privacy anxiety solely to the events of the Confederation years. As Adams's writings demonstrate, however, the origins of the founders' preoccupation with the evils of privacy ran far deeper than either of these accounts suggests. Indeed, only a broader, more cultural reading of the role of privacy truly captures the extent to which the concept influenced the attitudes of the founding generation—especially Adams—concerning several of the most significant issues of contemporary political theory: virtue, passion, decay, and public life.

To leaf through Adams's abundant writings is to be struck by the number of pages devoted to plumbing the depths of both friends and strangers' motivations, desires, and disappointments. Throughout his life, Adams paid close attention to human nature on a large scale, bringing his vast knowledge of law and history to bear on his equally

76. Gordon S. Wood, *Interests and Disinterestedness in the Making of the Constitution*, *in* Beyond Confederation: Origins of the Constitution and American National Identity 69, 81 (Richard Beeman et al. eds., 1987). Michael Sandel cites Wood to support his claim that the United States has become a "procedural republic" and is therefore unable to address deep moral questions. Michael J. Sandel, Democracy's Discontent: America in Search of a Public Philosophy 108, 129 (1996).

77. Mindle, *supra* note 43, at 583.

vast experience in the world of people. A few points seemed clear to him: (1) all people felt the impulse toward vice, passion, and comfort; (2) left to themselves, the majority of people would follow those impulses; and (3) the work of government was to harness these impulses and put them to productive use, subordinating personal drives and selfish motives to an overarching institutional system.[78] Indeed, no founder understood the need to suppress personal desires more fully than the second President of the United States, who constantly upbraided himself for his own character flaws and mistakes of judgment.[79] To a modern reader, Adams's deep suspicion of the private realm underpins his anxious comments on virtue, passion, decay, and public life. Moreover, the very words "private" and "public" formed a kind of refrain in his writings, suggesting that the author himself may have been conscious that his views stemmed from an overarching suspicion of privacy.

Yet the suspicion of privacy that Adams had so forthrightly articulated during his lifetime, and that many of his contemporaries appeared to share, somehow vanished from the landscape after his death. Rather than hailing Adams as one architect of a system that put private desires to work in the service of the common weal, many Americans of the nineteenth and twentieth centuries awarded this distinction solely to Madison, associating Adams with old regimes of monarchy and aristocracy based on a misreading of his *Defence of Constitutions* and *Discourses on Davila*.[80] Moreover, they forgot his warnings against vice, passion, and decay as well as the distrust of privacy that lay beneath those warnings. As Joseph Ellis has argued, Adams's views simply did not comport with the liberal vision that came to dominate nineteenth- and twentieth-century America, for Adams

> represents a cluster of political principles that do not fit comfortably within the framework of our national political mythology. Memorials will only be erected to him, according to this train of

78. In a related vein, Joanne Freeman has argued that honor politics, especially dueling and other reputation-based practices, formed "a regulated force of government, the ultimate check in an intricate system of checks and balances." Joanne B. Freeman, Affairs of Honor: National Politics in the New Republic xix (2001).

79. Adams's diary seems to have provided the chief receptacle for this stream of self-criticism. "Vanity I am sensible, is my cardinal Vice and cardinal Folly," read one chastisement, "and I am in continual Danger, when in Company, of being led an ignis fatuus Chase by it, without the strictest caution and watchfulness over my self." Ellis, *supra* note 13, at 49-50 (quoting Adams).

80. Gordon Wood and Joyce Appleby have each argued that Adams was—and was seen as—increasingly out of touch with the liberalization of America after the 1790s. One chapter in Wood's *Creation of the American Republic* bears the title "The Relevance and Irrelevance of John Adams." Wood, *supra* note 24, at 567-92; *see also* Joyce Appleby, *The New Republican Synthesis and the Changing Political Ideas of John Adams*, 25 Am. Q. 578, 579-80 (1973).

> thought, when the rhetoric of Jeffersonian liberalism ceases to dominate mainstream American culture; when the exaltation of "the people" is replaced by a quasi-sacred devotion to "the public". . . .[81]

Just as Adams had feared throughout his life, his longtime rival and friend Jefferson—whose soul Adams had once described as "poisoned with ambition"—outstripped him in the race to claim posterity.[82]

Most startling, however, has been the power of the liberal, Jeffersonian vision to blot out any memory of the second president's lifetime contemplation and suspicion of privacy. As *Griswold* and the progeny of that fecund case have demonstrated, the *private* realm, not the public one, captured the imaginations of twentieth-century American political and legal theorists, culminating in the addition of the right to privacy to Jefferson's list of self-evident truths. Although privacy has certainly established itself in modern America, Adams's writings remind us that events might have turned out differently. In contrast to *Griswold*'s view of privacy as a frail flower needing constant protection from the destructive force of the state, Adams saw privacy as pervasive and omnipresent, and private interests as tenacious weeds that managed to work their way into every crevice of human interaction. To the public, with its duties, not to individuals, with their privileges: this was Adams's deepest allegiance. Adams found worrisome signs of privacy—such as vice, passion, and decay—at every turn, but he remained confident throughout his life that its harmful effects could be contained by a vigorous public realm.

81. Ellis, *supra* note 13, at 232.
82. McCullough, *supra* note 13, at 448 (quoting Adams).